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No. 73-1378

In the Supreme Court of the United States

OCTOBER TERM, 1973

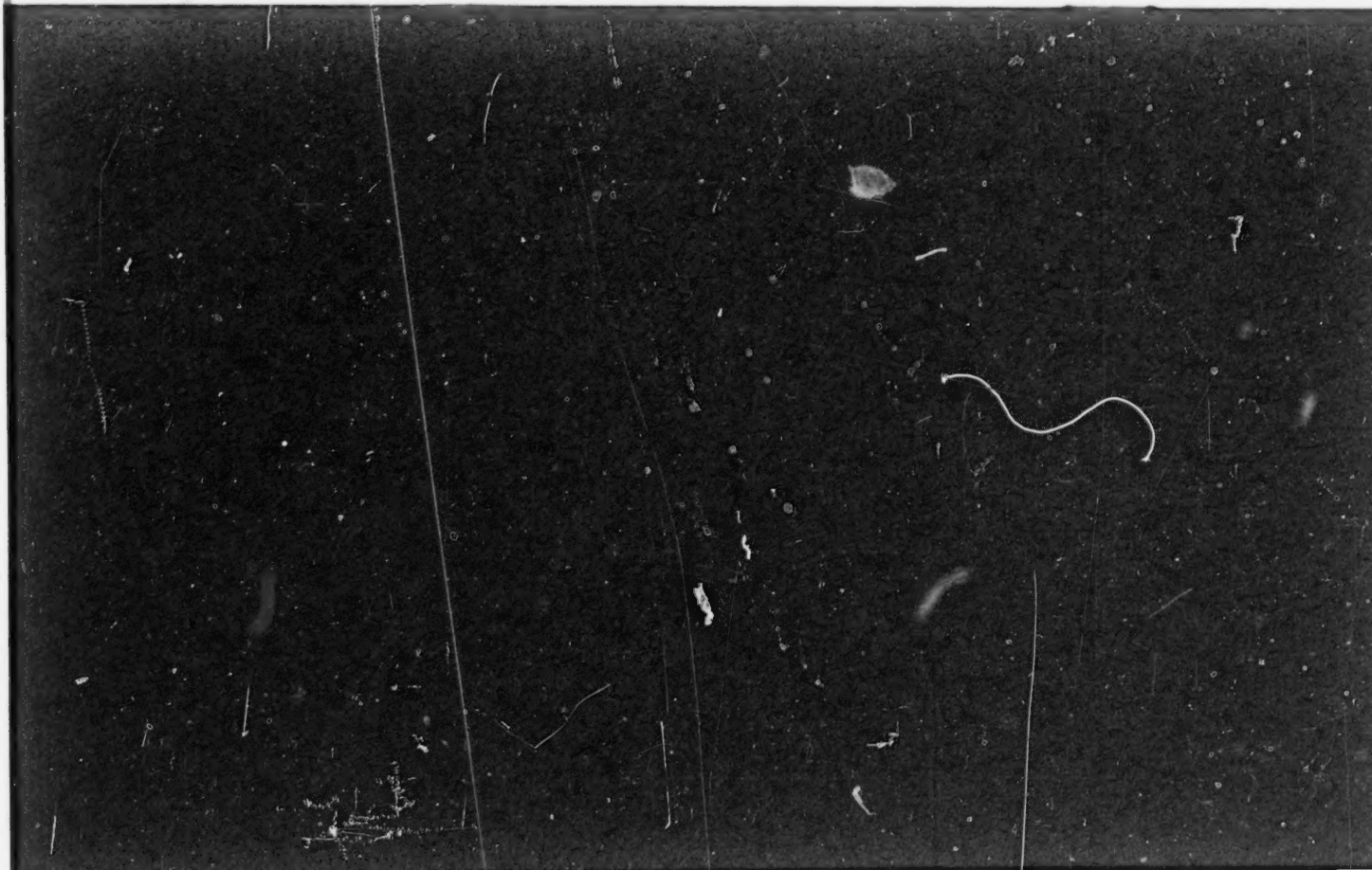
RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

OSSIPEE CLEAN WATER, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

ROBERT H. BORK,
Solicitor General,
IRVING JAFFE,
Acting Assistant Attorney General,
EDMUND W. KITCH,
Assistant to the Solicitor General,
ROBERT E. KOPP,
ELOISE E. DAVIES,
Attorneys,
Department of Justice,
Washington, D.C. 20530.



In the Supreme Court of the United States

OCTOBER TERM, 1973

No.

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

CAMPAIGN CLEAN WATER, INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Solicitor General, on behalf of the Administrator of the Environmental Protection Agency, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B, pp. 35A–53A)[1] is not reported. The opinion of the district court (App. F, pp. 79A–100A) is reported at 361 F. Supp. 689.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit (App. D, pp. 57A–58A) was entered on

[1] Appendix references are to the combined appendix to the petitions in this case and the companion case of *Train* v. *City of New York*.

534-087—74 —1

December 10, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the allotment by the Administrator of less than the full amounts authorized to be appropriated by Section 207 of the Federal Water Pollution Control Act Amendments is subject to judicial review to determine whether the Administrator abused his discretion in making the allotment.

2. Whether an action to compel the allotment of additional amounts is barred by the doctrine of sovereign immunity.

STATUTES INVOLVED

Administrative Procedure Act Section 10(2), now 5 U.S.C. 701(a)(2).

> This chapter applies, according to the provisions thereof, except to the extent that * * * agency action is committed to agency discretion by law.

The pertinent portions of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 (33 U.S.C. (Supp. II) 1281 *et seq.*) provide:

> *Sec. 205.* (a) Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Con-

trol Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States. For the fiscal years ending June 30, 1973, and June 30, 1974, such ratio shall be determined on the basis of table III of House Public Works Committee Print No. 92-50. Allotments for fiscal years which begin after the fiscal year ending June 30, 1974, shall be made only in accordance with a revised cost estimate made and submitted to Congress in accordance with section 516(b) of this Act and only after such revised cost estimate shall have been approved by law specifically enacted hereafter.

(b)(1) Any sums allotted to a State under subsection (a) shall be available for obligation under section 203 on and after the date of such allotment. Such sums shall continue available for obligation in such State for a period of one year after the close of the fiscal year for which such sums are authorized. Any amounts so allotted which are not obligated by the end of such one-year period shall be immediately reallotted by the Administrator, in accordance with regulations promulgated by him, generally on the basis of the ratio used in making the last allotment of sums under this section. Such reallotted sums shall be added to the last allotments made to the States. Any sum made available to a State by reallotment under this subsection shall be in addition to any funds otherwise allotted to such State for grants

under this title during any fiscal year.

(2) Any sums which have been obligated under section 203 and which are released by the payment of the final voucher for the project shall be immediately credited to the State to which such sums were last allotted. Such released sums shall be added to the amounts last allotted to such State and shall be immediately available for obligation in the same manner and to the same extent as such last allotment.

* * * * *

Sec. 207. There is authorized to be appropriated to carry out this title, other than sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 3, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000.

STATEMENT

As explained in the petition for a writ of certiorari we are filing simultaneously in *Train* v. *City of New York*, the expenditure of funds under the federal grant program for building approved sewage treatment plants created by Title II of the Federal Water Pollution Control Act Amendments of 1972 involves several stages. This case is another challenge to the action of the Administrator on November 28, 1972, taken pursuant to a direction of the President, in allotting $2 billion of the "not to exceed" $5 billion authorized to be appropriated in Section 207 of the Act for fiscal year 1973, and allotting $3 billion of the "not to exceed" $6 billion authorized for fiscal year 1974.

On January 15, 1973, the plaintiff, an organiza-

tion of Virginia ecologists, filed a complaint in the United States District Court for the Eastern District of Virginia alleging that the defendant Administrator had a duty to allot all sums authorized by Section 207 or alternatively that his failure to allot more than 45 percent of the funds authorized was an abuse of discretion (Complaint ¶9). The district court held that the Administrator had discretion under the statute to allot less than the full amount authorized (App. F, pp. 95A–96A), but that his decision to allot only 45 percent was an abuse of discretion (App. F, p. 99A).

On appeal, the court of appeals noting that the plaintiff conceded that the Administrator had discretion to allot less than the amounts authorized by Congress (App B, p. 39A), reversed the holding of an abuse of discretion on the ground that it was not supported by the record (App. B, pp. 47A–53A). The court of appeals held, however, that the exercise of the Administrator's discretion is subject to judicial review by a hearing *de novo* in the district court and remanded the case to that court for further proceedings.

REASONS FOR GRANTING THE WRIT

The issues in this case are closely related to those raised in the petition for certiorari in *Train* v. *City of New York,* which we are filing simultaneously. In *City of New York* the Court of Appeals for the District of Columbia Circuit held that the Administrator has no discretion to allot less than the amount Congress has authorized to be appropriated. In the present case, on the other hand, the district court held that the Administrator does have such discretion, and the court

of appeals found it unnecessary to decide that issue because the plaintiff did not challenge the ruling. The court of appeals did hold, however, that the action of the Administrator in making the allotment was subject to judicial review in the district court to determine whether that action constituted an abuse of discretion. We believe that the district court in the present case correctly held that the Administrator has such discretion, but that the court of appeals erred in concluding that his exercise of that discretion is subject to judicial review.

1. This case involves the important issue of the role of the courts in reviewing decisions made by the executive branch relating to the commitment and expenditure of federal government funds where authority to control the rate of such commitment and expenditure has admittedly been conferred on the Executive Branch by the Congress.

Section 10(2) of the Administrative Procedure Act, now 5 U.S.C. 701(a)(2), precludes judicial review under that Act of "agency action" that is "committed to agency discretion by law." In *Panama Canal Co.* v. *Grace Line, Inc.*, 356 U.S. 309, this Court held that a suit to compel the Canal Company to proscribe new tolls for the use of the Canal and to refund tolls allegedly illegally collected raised an issue "committed to agency discretion" and not subject to judicial determination. The Court pointed out that determining the proper level of tolls for the Canal "involve[s] nice issues of judgment and choice * * * which require the exercise of informed discretion" and requires the Canal Company to make "questions

of judgment requiring close analysis and nice choices" (356 U.S. at 317, 318).

That principle, we submit, is equally applicable to this situation, so that the action of the Administrator in allotting less than the amount appropriated similarly is not subject to judicial reexamination, even where it is claimed that such allotment constitutes an abuse of discretion. In deciding in the fall of 1972 the amount of funds to allot for fiscal years 1973 and 1974, it was necessary to make estimates of the level and timing of spending that would ensue from any given level of commitment, the income resources likely to be available to the federal government during those years, the nature of competing program needs and demands, the state of the economy, and the impact of the spending on the economy. The very nature of those judgments makes it inappropriate for the courts to attempt to review the Administrator's judgment, and particularly under the necessarily vague standard of "abuse of discretion."

The court of appeals relied on dictum in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410, referring to Section 10(e) as "a very narrow exception" (App. B, p. 45A). But that dictum, uttered in the narrow context of a wholly different case involving different policy considerations, should not control here. *Overton Park* involved a statute which provided explicit directions to the Secretary of Transportation relating to the use of park spaces for highways. The issue here, on the other hand, is more like that in *Panama Canal Co.*, and that case, rather than *Overton Park*, provides the governing principle.

2. In our petition for certiorari in the *City of New York* case, we also explained why we believe that an action to compel allotment is barred by the doctrine of sovereign immunity. The arguments there made are equally applicable to this suit.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

IRVING JAFFE,
Acting Assistant Attorney General.

EDMUND W. KITCH,
Assistant to the Solicitor General.

ROBERT E. KOPP,
ELOISE E. DAVIES,
Attorneys.

MARCH 1974.

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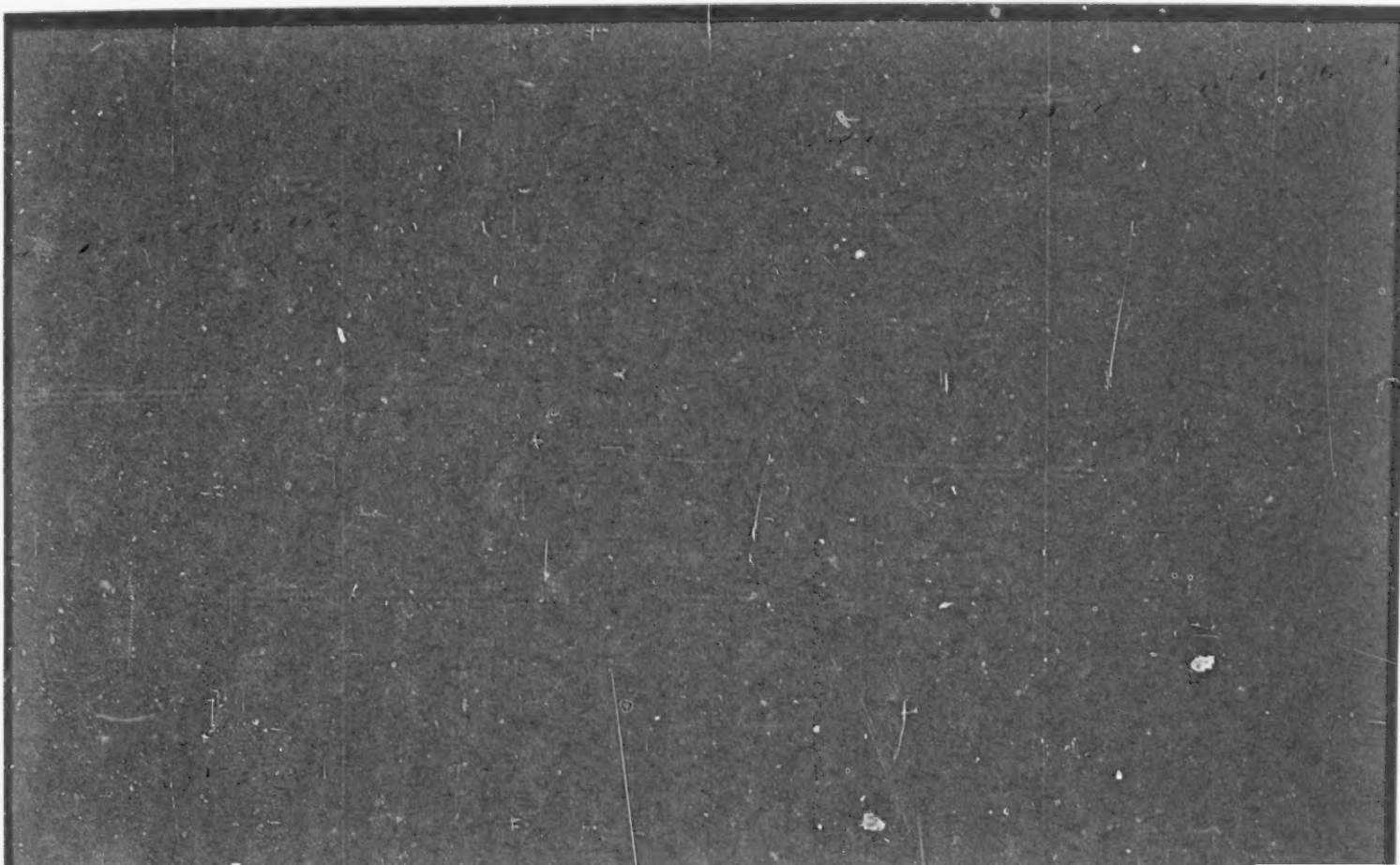


Supreme Court, U. S.
FILED
MAR 11 1974
MICHAEL RODAK, JR., CLERK

No. 73-1377 and No. 73-1378

In the Supreme Court of the United States

OCTOBER TERM, 1973

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

THE CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK

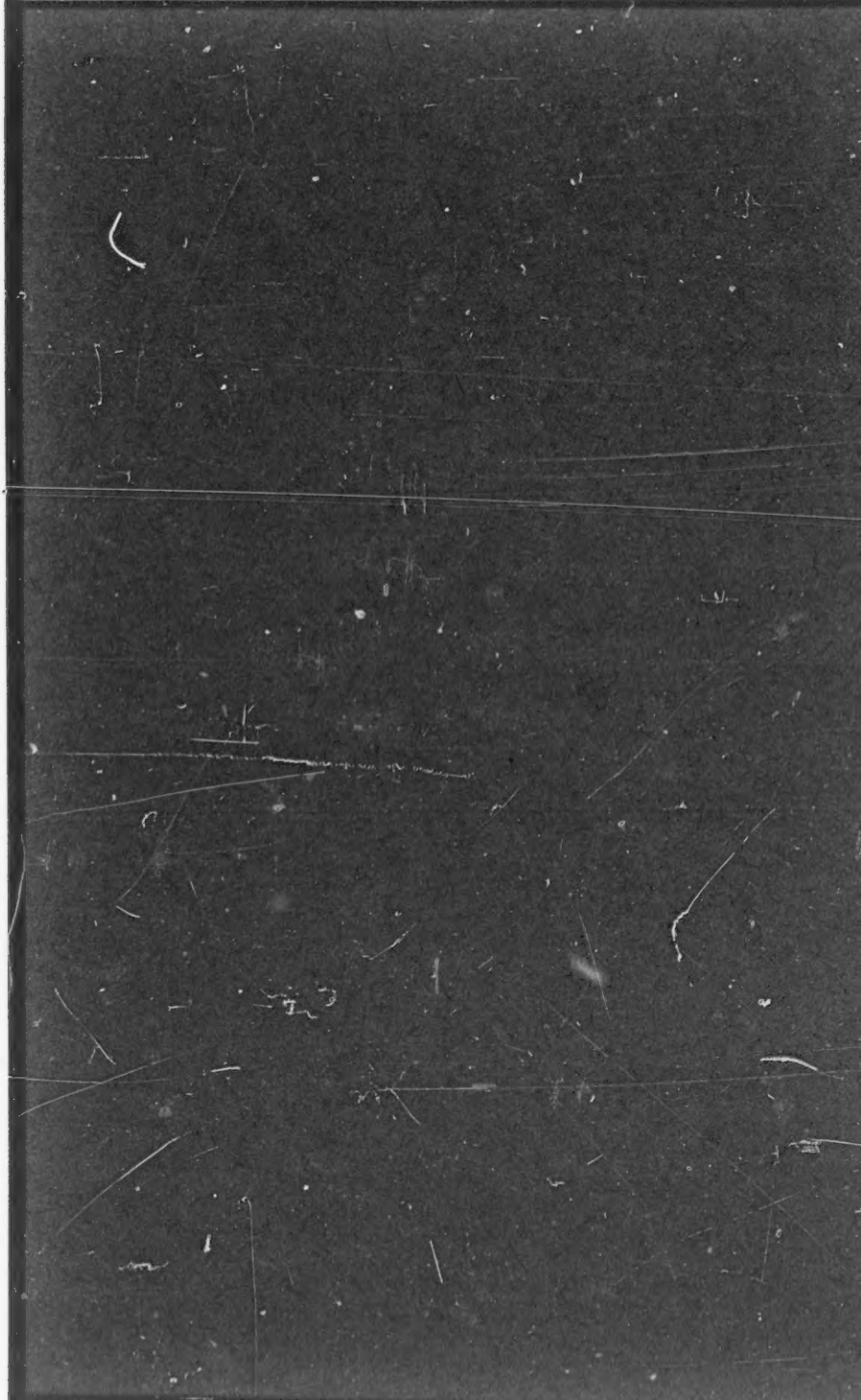
CITY OF DETROIT, PARTY PLAINTIFF

RUSSELL E. TRAIN, ADMINISTRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PETITIONER

v.

CAMPAIGN CLEAN WATER, INC.

COMBINED APPENDIX TO THE PETITIONS FOR WRITS OF CERTIORARI



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533-925—74——1

APPENDIX A

United States Court of Appeals

For the District of Columbia Circuit

No. 73-1705

THE CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK CITY OF DETROIT, (PARTY PLAINTIFF)

v.

RUSSELL E. TRAIN, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

Appeal from the United States District Court for the District of Columbia

Decided January 23, 1974

Before: TAMM, ROBINSON and WILKEY, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* TAMM.

TAMM, *Circuit Judge:* This suit was brought as a class action by the City of New York (hereafter, "City") on behalf of itself and all other similarly situated municipalities within the State of New York.

The defendant below was Mr. Russell E. Train, A
ministrator of the Environmental Protection Agen
(hereafter, "The Administrator"). The City
Detroit, Michigan, was granted leave to intervene
party plaintiff. On May 8, 1973, the United Sta
District Court for the District of Columbia gran
City's motions for summary judgment and to ma
tain this lawsuit as a class action, concurrently de
ing the Administrator's motion to dismiss. The A
ministrator brings this appeal from the trial cou
ruling, and, for the reasons stated *infra*, we affirm

I. Background

This is but one of a number of cases[2] presen
pending across the country concerning allocation

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[1] Russell E. Train, Administrator of the Environmen
Protection Agency has been substituted for William Ruck
haus, the Administrator of the EPA at the time this act
was commenced. Rule 43(c)(1), Fed. R. App. Proc.

[2] We provide a list of cases filed as of December 12, 19
"Anthony R. Martin-Trigona v. William D. Ruckelsha
N.D.Ill., Civil Action No. 72-3944;
"Campaign Clean Water, Inc. v. Ruckelshaus, E.D. V
Civil Action No. 18-75-R, reversed and remanded, Campa
Clean Water, Inc. v. Train, No. 73-1745 (4th Cir., December
1973);
"George E. Brown, Jr. v. Ruckelshaus, C.D. Calif., C
Action No. 73-154-AAH;
"Herbert C. Klein, et al. v. Ruckelshaus, D.D.C., Ci
Action No. 151-73;
"State of Minnesota v. United States Environmental P
tection Agency, et al., D. Minn., Civil Action No. 4-73 Civ. 1
"Mayor Morton Salkind, et al. v. Ruckelshaus, D. N.J., Ci
Action No. 2027-72;
"City of Los Angeles v. Ruckelshaus, C.D. Calif., Ci
Action No. 73-736-JWC;
"State of Texas v. Fri, W.D. Texas, Civil Action No. A-
CA-38;

funds under the Federal Water Pollution Act Amendments of 1972[3] (hereafter, "Act"). In order to place

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"State of Maine, et al. v. Robert W. Fri, et al., D. Maine, Civil Action No. 14-51;"

Letter from National Association of Attorneys General to Impoundment Mailing List, December 12, 1973; *See also* Appellant's Br. at 2-3.

[3] Pub. Law 92-500, 86 Stat. 816, 33 U.S.C. ch. 26 §§ 1251 *et seq.*

Title I of the act provides in pertinent part:

"TITLE I—RESEARCH AND RELATED PROGRAMS

"DECLARATION OF GOALS AND POLICY

"Sec. 101. (a) The objective of this Act is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this Act—

"(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

"(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

"(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

"(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

"(5) it is the national policy that area-wide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State;

"* * *"

Title II of the Act (§§ 201-212) entitled "Grants for Construction of Treatment Works" provides in pertinent part:

"Allotment

"Sec. 205. (a) Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the Janu-

the instant dispute in its proper context it is necessary to understand the legislative history of the Act. The Act revised the procedures for funding federal aid to local governments for the purpose of the construction of sewage treatment plants. Prior to the Act's passage,

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ary 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States. For the fiscal years ending June 30, 1973, and June 30, 1974, such ratio shall be determined on the basis of table III of House Public Works Committee Print No. 92-50. Allotments for fiscal years which begin after the fiscal year ending June 30, 1974, shall be made only in accordance with a revised cost estimate made and submitted to Congress in accordance with section 516(b) of this Act and only after such revised cost estimate shall have been approved by law specifically enacted hereafter.

"(b)(1) Any sums allotted to a State under subsection (a) shall be available for obligation under section 203 on and after the date of such allotment. Such sums shall continue available for obligation in such State for a period of one year after the close of the fiscal year for which such sums are authorized. Any amounts so allotted which are not obligated by the end of such one-year period shall be immediately reallotted by the Administrator, in accordance with regulations promulgated by him, generally on the basis of the ratio used in making the last allotment of sums under this section. Such reallotted sums shall be added to the last allotments made to the States. Any sum made available to a State by reallotment under this subsection shall be in addition to any funds otherwise allotted to such State for grants under this title during any fiscal year.

"(2) Any sums which have been obligated under section 203 and which are released by the payment of the final voucher for the

these expenditures were first authorized and then specifically funded by the normal Congressional appropriation process. Due to the nature of this process, local governmental recipients could not ascertain the exact amount they would receive until *after* the formal appropriation. As a result, local governments were

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project shall be immediately credited to the State to which such sums were last allotted. Such released sums shall be added to the amounts last allotted to such State and shall be immeditaely available for obligation in the same manner and to the same extent as such last allotment.

"Reimbursement and Advanced Construction

"Sec. 206.

"* * *.

"(f)(1) In any case where all funds allotted to a State under this title have been obligated under Section 203 of this Act, and there is construction of any treatment works project without the aid of Federal funds and in accordance with all procedures and all requirements applicable to treatment works projects, except those procedures and requirements which limit construction of projects to those constructed with the aid of previously allotted Federal funds, the Administrator, upon his approval of an application made under this subsection therefor, is authorized to pay the Federal share of the cost of construction of such project when additional funds are allotted to the State under this title if prior to the construction of the project the Administrator approves plans, specifications, and estimates therefor in the same manner as other treatment works projects. The Administrator may not approve an application under this subsection unless an authorization is in effect for the future fiscal year for which the application requests payment, which authorization will insure such payment without exceeding the State's expected allotment from such authorization.

"(2) In determining the allotment for any fiscal year under this title, any treatment works project constructed in accordance with this section and without the aid of Federal funds shall not be considered completed until an application under the provisions of this subsection with respect to such project has been approved by the

hesitant to enter construction contracts with only a hope that federal monies would be ultimately passed to them.[4]

The Act was passed to insure that ultimate grantees could rely in advance on the amounts available. Section 101(a) declares that to clean the nation's waters "it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works." To this end, the Act created a funding mechanism known as "contract authority".[5] The technical operation of the sections of the Act relating to this "contract authority" spending is at the heart of this dispute and a thorough understanding of the mechanism is, therefore, imperative.

There are six distinct steps involved in funding under the Act. (1) Authorization by Congress to

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Administrator, or the availability of funds from which this project is eligible for reimbursement has expired, whichever first occurs.

"Authorization

"Sec. 207. There is authorized to be appropriated to carry out this title, other than sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000 and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000."

[4] It appears that there was a substantial gap between the amounts authorized and the amounts appropriated. The Senate Committee on Public Works, in its report on its version of the Act, observed that:

"The lack of adequate funding of grants to assist States and localities in constructing sewage treatment plants is causing critical problems.

"Of the $3.4 billion authorized for this purpose by the 1966 legislation, only $2.2 billion was appropriated. The backlog of projects eligible for Federal payments has reached a total of nearly $2 billion."

S. Rep. No. 92-414, 92nd Cong., 1st Sess. 5 (1971).

[5] *See* S. Rep. No. 92-414 *supra* at 35.

appropriate funds (§ 207); (2) "allotment" of these authorized sums among the various states, pursuant to formula (§ 205); (3) review by the Administrator of project proposals submitted by a particular municipality (§§ 203, 201(g)(2) and 204); (4) "obligation" by the Administrator of the federal share of an approved project (§§ 203 and 201(g)(1)); (5) appropriation by Congress of funds to pay obligated contracts as they fall due; and (6) disbursement of the funds (§ 203 (b) and (c)).

After the Act was enacted into law, over presidential veto,[6] the President wrote to the Administrator, directing him to allot "$2 billion of the amount authorized for the fiscal year 1973, and no more than $3 billion of the amount authorized for the fiscal year 1974."[7] The Administrator followed orders and allocated a total of $5 billion[8] for both fiscal years. It is this final action by the Administrator which has been labeled "Presidential impoundment"[9] and which was successfully challenged in the trial court by plaintiff-appellee City.

[6] *See* Presidential Veto Message of October 17, 1972, 18 Cong. Rec. S 18534 (daily ed. October 17, 1972).

[7] Letter from the President to Mr. William Ruckelshaus, dated November 22, 1972, J.A. at 15a.

[8] 37 Fed. Reg. 26282 (December 8, 1972).

[9] Not all commentators have agreed on a precise definition of "impounding". *Compare* Boggs, *Executive Impoundment of Congressionally Appropriated Funds*, 24 U. Fla. L. Rev. 221, 222 (1972) *with* Note, *Impoundment of Funds*, 86 Harv. L. Rev. 1505 n.1 (1973) *and* Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 Geo. Wash. L. Rev. 124 (1969). It is true that we are concerned here with the mechanism of contract authorization rather than direct appropriation. We today only decide whether the Act permits withholding of funds at the allotment stage. We will not, therefore, pursue the semantic argument that because of the different funding mechanism that is *not* an "impoundment of funds" but rather a "far

II. The Trial Court's Ruling

Plaintiff-appellee City [10] basically argued below that §§ 205(a) and 207 of the Act, read together, *required* the Administrator to allot among the states the sums of $5 billion and $6 billion in fiscal years 1973 and 1974 respectively. Once allotted, these amounts would then be available for obligation under the Act. By the allotment of only $5 billion total for fiscal year 1973 and 1974, it is argued that the Administrator violated the statute.

The Administrator, defendant-appellant, made several arguments in the trial court. He argued that (1)

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more serious case." *See* Brief of California Attorney General as *Amicus Curiae* at 6. The wisest course to leave the search for the proper definition of "Impoundment" to the legal commentators.

On the subject of impoundment generally, especially the constitutional problems, *see also* Note, *The Likely Law of Executive Impoundment*, 59 Iowa L. Rev. 50 (1973); Comment, *Presidential Impounding of Funds: The Judicial Response*, 40 U. Chi. L. Rev. 328 (1973); Note, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 Yale L.J. 1636 (1973); Miller, *Presidential Power to Impound Appropriated Funds: An Exercise in Constitutional Decision-Making*, 43 N.C.L. Rev. 502 (1965); Church, *Impoundment of Appropriated Funds: The Decline of Congressional Control Over Executive Discretion*, 22 Stan L. Rev. 1240 (1970); Fisher, *Presidential Spending Discretion and Congressional Controls*, 37 Law & Contemp. Prob. 135 (Winter, 1972); Stassen, *Separation of Powers and the Uncommon Defense: The Case Against Impounding of Weapons System Appropriations*, 57 Geo. L.J. 1159 (1969).

The legal literature contains no detailed analysis of the precise problem *sub judice*. *See* Note, *supra*, 82 Yale L.J. at 1652; Note, *supra*, 59 Iowa L. Rev. at 55 n.42; Note, *supra*, 86 Harv. L. Rev. at 1526 n.116.

[10] The arguments of plaintiff-interventor, City of Detroit, were found by the trial court to be "substantially the same"

the trial court lacked jurisdiction, the suit being barred by the doctrine of Sovereign Immunity; and (2) that the claim failed to present a justiciable case or controversy because (a) it was "hypothetical and premature" and (b) it stated a "political question" thus beyond the jurisdiction of the court. The trial court found against the Administrator on all these arguments,[11] but appellant brings before this court only two issues: (1) whether Sovereign Immunity bars this suit; (2) whether §§ 205(a) and 207 of the Act confer discretion on the Administrator to determine the sum to be alloted under the Act.

III. Sovereign Immunity

It is our opinion that the trial court was correct in holding that City's suit is not barred by the principle of sovereign immunity. Counsel for the Administrator conceded at oral argument that the law of this circuit, *Seanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859, 873 (D.C. Cir. 1970); *Constructores Civiles de Centroamerica* v. *Hannah*, 459 F.2d 1183, 1191 (D.C. Cir. 1972), permits the maintenance of this suit with the Administrator as defendant.[12] In view of this conces-

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as those of plaintiff City, and so all arguments were treated together. City of New York v. Ruckleshaus, Civil Action No. 2466-72 (D.D.C. filed May 8, 1973) J.A. at 53a n.3. We agree and will not differentiate between plaintiff and plaintiff-intervenor.

[11] City of New York, *supra* note 10, J.A. at 56a-63a.

[12] Tape of oral argument November 2, 1973, contains the following colloquy:

"Judge Wilkey: Would you like to elaborate upon the question of sovereign immunity?

"Counsel: As I understand the doctrine of sovereign immunity, as developing a close relationship between the merits and the doctrine. The exception to the doctrine which is claimed to be applicable by the plaintiff here is that the Administrator

sion, we need do no more than state that we hold the suit is not barred. We agree with the reasoning of the

---

was essentially acting in violation of the statute, acting outside the scope of his authority, and therefore not acting on behalf of the sovereign but simply as an individual in excess acting outside the law who should be ordered to act within the law. Our contention is that he was acting within the statute, properly exercising his authority, therefore acting on behalf of the sovereign and if we are persuasive on the merits, then we should also win on the doctrine of sovereign immunity. The—Now it may be and I . . .

"Judge: [Inaudible] appreciate any idea of sovereign immunity does it? If you go on that theory the sovereign is no better off than any other citizen.

"Counsel: I think we are getting close to that. There may survive a zone of plausibly legal activities where the government has a kind of special position—a certain deference that a court will find a kind of protection of sovereign immunity reaches somewhat beyond the very strictest construction of the statute. I find the present state of the law in somewhat of a turmoil and I think this circuit has developed a number of new doctrines which throw much of recent law into question, particularly the *Seanwell* case and I don't think the Supreme Court has had the time to sort out the wisdom of that and the impact of that, and I—

"Judge: Are you reserving the sovereign immunity argument for the Supreme Court?

"Counsel: We are reserving the argument for the Supreme Court and we would be delighted, just delighted to prevail on it here.

"Judge: That doesn't leave you much choice in that regard does it?

"Counsel: You mean to reserve it or to—

"Judge: Yes, to reserve it.

"Counsel: Obviously the problem of the position of sovereign immunity is one that impacts not just on this case but many, many cases for the government and we are in a position where we do not win frequently at the moment on the issue of sovereign immunity, but where it is not yet responsible for us not to urge it and hopefully there will be some more authorita-

trial court and here adopt the opinion below on the extent that it treats the Sovereign Immunity question.[13]

IV. The Meaning of §§ 205(a) and 207

We now turn to the analysis which is central to resolution of the matter *sub judice, i.e.* the meaning of §§ 205(a) and 207 of the Act which are reproduced in the margin *supra*. Appellee-City relies upon the phrase "shall be allotted" in § 205(a), arguing that by the use of "shall", rather than a word plainly conferring greater discretion (*e.g.* "may"), Congress intended that allotment under the Act be mandatory. The Administrator, on the other hand, asserts that changes in these sections of the Act, prior to its enactment, show a legislative intent to confer discretion upon the Administrator. H.R. 11896, the bill from which §§ 205 and 207 ultimately were derived, was amended in conference. The phrase "not to exceed" was inserted before each specified sum § 207 and the word "all" was deleted from before the phrase "sums authorized to be appropriated" in § 205(a). Appellant argues that these changes indicate that Congress intended to give the Administrator absolute discretion over whether and how much to allot under the Act.

A. *The Overall Intent of the Act*

Initially, it is to be noted that a "plain meaning" analysis will not suffice here. As the Administrator admits "there is no happy marriage between the provisions of the statute . . . ."[14] We agree for we can find no way to harmonize the term "shall allot" and the language concerning sums "not to exceed." Ac-

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tive pronouncements from the Supreme Court within a few years that will clarify where we stand."

[13] City of New York, *supra* note 10, J.A. at 56a-57a.

[14] Appellant's Reply Brief at 2.

cordingly, we turn to an analysis of relevant legislative history to ascertain whether the legislature intended any discretion at the "allotment" stage of the funding mechanism. *The Wilderness Society* v. *Morton*, Nos. 72-1796, 1797, 1798 (D.C. Cir., February 9, 1973 slip op. at 22).

The legislative history is extensive, covering some 1700 pages.[15] Of particular importance are the views expressed by Congressman William Harsha and Senator Edmund Muskie, sponsors of the legislation.[16] The amendments upon which the Administrator relies were authored and sponsored by Congressman Harsha, and are commonly referred to as the "Harsha Amendments."

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[15] "A Legislative History of the Water Pollution Control Act Amendments of 1972," Committee Print, Committee on Public Works, 93d Cong., 1st Sess., January 1973. Senator Muskie commented on the magnitude of the legislative task:

"I have been a Member of the Senate for 13 years, and I have never before participated in a conference which has consumed so many hours, been so arduous in its deliberations, or demanded so much attention to detail from the members. The difficulty in reaching agreement on this legislation has been matched only by the gravity of the problems with which it seeks to cope."

118 Cong. Rec. S 16869 (daily ed. October 4, 1972).

[16] *See, e.g.*, First National Bank of Logan, Utah v. Walker Bank and Trust Co., 385 U.S. 252, 261 (1966); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394-95 (1951).

Congressman Harsha is the ranking minority member of the House Committee on Public Works which reported H.R. 11896. He was the bill's floor manager and also a member of the conference committee which developed the final language of the Act.

Senator Muskie is chairman of the Senate Subcommittee on Air and Water Pollution which reported S. 2770, the Senate version of the Act. He was floor manager for that bill and a member of the conference committee.

After a careful reading of the relevant legislative materials, we believe that throughout the lengthy legislative process, Congress manifested an intent to *specifically commit* federal funds. It did so in recognition of the necessity of assuring the states that federal aid would be available. The need was recognized in 1971 by the Senate subcommittee considering water pollution:

> At a bare minimum the credibility of the existing federal commitment must be re-established by backing words of authorization with monies of appropriation. Whenever the nation seeks to encourage cities to plan and construct improvements which require many years to complete, the Congress must build reliability into its federal grant incentives. Major facilities cannot be stopped in midstream. A change in federal grant policy to establish a reliable commitment is vital but is not the only change that can and should be made in the federal legislative and regulatory approach to water pollution abatement.

U.S. Senate Committee on Public Works, Water Pollution Control Legislation Hearings, pt. 1, at 521 (1971).

This commitment continued and the subcommittee on Air and Water Pollution concluded in 1972:

> The language of subsection (b) [*sic*] of Section 207 provides that funds authorized for fiscal years 1973, 1974, and 1975, shall be available for obligation by contract upon their allocation to the States. The importance of assured Federal financial support to the achievement of the objectives of this title and to our national purpose of cleaning up polluted waterways cannot be overstated. The task is a massive one in terms of the work to be done and the funds to be expended.

S. Rep. No. 92–414, 92nd Cong., 1st Sess. 35 (1971).

The two principal sponsors of the Act both clearly articulated their belief that federal money must be spent, and, in fact, strongly indicated their recognition that the full $18 billion would be allotted. Senator Muskie stated:

> The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation. The members agreed in the end that a total of $18 billion *had to be committed* by the Federal Government in 75 percent grants to municipalities during fiscal years 1973–75. That is a great deal of money; but that is how much it will cost to begin to achieve the requirements set forth in the legislation. . . .
>
> Mr. President, to achieve the deadlines we are talking about in this bill we are going to need the strongest kind of evidence of the Federal Government's commitment to pick up its share of the load. We cannot back down, with any credibility, from the kind of investment in waste treatment facilities that is called for by this bill. And the conferees are convinced that *the level of investment that is authorized is the minimum* dose of medicine that will solve the problems we face.

118 *Cong. Rec.* S 16870–71 (daily ed. October 4, 1972) (emphasis added).

It is evident that Congress was concerned with possible inflationary effects. However, it is just as evident that Congress believed that the full $18 billion expenditure was necessary. Senator Cooper [17] stated:

> I believe that the funding levels for these and other provisions of the bill, which total over $24

[17] Senator Cooper was the ranking minority member of the Senate Committee on Public Works and a floor manager of the bill.

billion—subject to the usual presidential responsibility for evaluating these needs in relation to other national priorities—are responsible, are consonant with the magnitude of our Nation's water quality problems, and will not have an inflationary effect upon our economy. * * * * * *.

Contract authority is provided for up to $5 billion in 1973, $6 billion in 1974, and $7 billion in 1975. *This will be allocated to the States on the basis of the Environmental Protection Agency's annual assessment of needs established without regard to budgetary limitations and other non-water quality factors.*

Id. at S 16881 (emphasis added). Senator Bayh also emphasized the necessity of a full Federal commitment:

> The conferees agreed to accept the House passed authorizations for grants to the States for the construction of waste treatment plants, including sewage collection systems. This is construction which is absolutely essential if we are to make any meaningful progress toward the national goals established in the bill. The total authorization for this purpose is $18 billion over the 3 fiscal years ending in 1975. There is *no doubt that this money is needed*, for without substantial authorizations he [*sic*] bill would be little more than a series of empty promises. The amounts allocated for grants for construction of treatment works will be distributed to the States on the basis of need, with the Federal share of construction costs being 75 percent.

Id. at S 16892–93 (emphasis added). Congressman Johnson made clear the intent of the House to spend $18 billion to meet the water pollution problem. In his report to the House, he stated:

> You may recall that the bill that passed this body last March called for authorizing a little more than $24.6 billion, the Senate bill author-

> ized $20 billion, and the administration requested $6 billion. The conferees have agreed on essentially the same figures as in the House bill, $24.6 billion for the period through fiscal 1975. A total of $18 billion of this sum is for construction grants, and breaks down not to exceed $5 billion for fiscal 1973, $6 billion for fiscal 1974, and $7 billion for fiscal 1975.
>
> Naturally, the large difference in what the administration asked, and what the conference bill provides, raises the question of why the substantial discrepancy?
>
> There is only one answer to that and it is that if we set out to do this job there is *no way we can accomplish it without paying the price.* If we want clean water, we have to pay for clean water. If we want the States and cities to move aggressively ahead in building waste treatment plants they must have Federal aid, and they must have confidence that Washington will continue to live up to its commitments.

Id. at H 9130 (emphasis added).

The President, in his veto message to Congress on October 17, shared this view that the Act would *require* ultimate expenditure of $18 billion for sewage treatment under § 207 of the Act:

> I am compelled to withhold my approval from S. 2770, the Federal Water Pollution Control Act Amendments of 1972—a bill whose laudable intent is outweighed by its unconscionable $24 billion price tag. My proposed legislation, as reflected in my budget, provided sufficient funds to fulfill that same intent in a fiscally responsible manner. Unfortunately the Congress ignored other vital national concerns and broke the budget with this legislation.

118 *Cong. Rec.* S 18534 (daily ed. October 17, 1972).

In the discussion of the Act prior to its being enacted over the veto, Congress again clearly expressed

its intention to provide the full $18 billion. Senator Muskie spoke of the President's concerns:

> But may I say to [Senator Scott], when we pass a piece of legislation like this, with its requirements imposed on industry, with its requirements imposed on the States, with its requirements imposed on the local governments, the question that faces us then is, as we imposed this commitment on them, what commitment are we prepared to accept on the part of the Federal Government?
>
> This point was well debated in the Senate when we took up this bill. I made it clear, the committee made it clear, that what we were asking of the Congress was a commitment that these people in other levels of government and the private sector could rely upon. Of course there is a commitment. The President 3 years ago, in his state of the Union message, said he had preempted the environmental issue and that he was making a commitment.
>
> * * *.
>
> The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation, and specifically studying how much money would be necessary to achieve the objective and goals of the act, as set forth in section 101(a).

118 *Cong. Rec.* S 18548 (daily ed. October 17, 1972). Congressman Harsha responded in a like vein:

> Mr. Speaker, there is another point which I must raise. We have known all along that it would take a massive amount of money and time to reclaim and to protect our precious water resources. But, we dare not measure the cost of this water bill merely in terms of dollars alone. We cannot measure the wealth of our great natural resources in dollars alone—and if we wait too long, all the dollars on earth won't

> buy back what we've lost. Under these circumstances, I am firmly convinced that the price of killing this water bill—of sustaining this Presidential veto—is far, far too costly.
> * * *.
>
> Furthermore, the President maintained that a vote to override the veto of the Water Pollution Control Act Amendments of 1972 was a vote to increase the likelihood of higher taxes. So be it, the public is prepared to pay for it. *To say we can't afford this sum of money is to say we can't afford to support life on earth.*
> * * *.
>
> Mr. Speaker, this is perhaps the most important environmental legislation the Congress has yet enacted. The question is not, *"Can we afford to spend $18 billion over the next 3 years for waste treatment plants?" but "Can we afford not to?"*

118 *Cong. Rec.* H 10268-69 (daily ed. October 18, 1972) (emphasis added).

The cardinal principle of interpretation is "to give effect to the intent of Congress." *United States* v. *American Trucking Assn's,* 310 U.S. 534, 542 (1940). We have included these extensive excerpts at this point because we find them in a clear expression of legislative will. We find that it was Congress' intention that the full $18 billion be spent to control water pollution. Had the statute been clearly drawn, this would end our inquiry, if in fact one need ever have begun. Unfortunately, we must still confront the problem of the Administrator's arguable discretion to allot or not allot. We do so in the belief that the legislative history, as quoted above, manifests an intent to create a procedure which would insure that the total authorized funds would be made available to the states. It is this goal which must guide us in in-

terpreting the funding mechanism, for if discretion in allotment would make the achievement of this goal more difficult, it must be assumed that Congress intended no such authorization. *See, e.g., United States* v. *Congress of Industrial Organizations,* 335 U.S. 106, 112 (1948); *Vermilya-Brown Co., Inc.* v. *Connell,* 335 U.S. 377, 388 (1948).

B. THE MEANING OF THE HARSHA AMENDMENTS

We now turn to the analysis of §§ 205(a) and 207, particularly with regard to the effect of the Harsha Amendments. As we indicated earlier, it is important to keep in mind the distinct stages involved in the contract-grant mechanism. Appellant-Administrator argues, primarily from the Harsha Amendments, that the Act permits discretion at the *allotment* phase. Appellee-City counters that while the Administrator might control the timing of future spending through delay of *obligation,* he must fully allot. We agree with Appellee because, after careful consideration of the relevant history, we find it clear that the Congressional intent, both before and after the Harsha amendments, was to make allotment mandatory.

Section 205(a), by its terms, supports the Appellee. It is mandatory in tone: "Sums authorized to be appropriated pursuant to section 207 for each fiscal year . . . *shall be allotted* by the Administrator. . . ." (Emphasis added.)

The Appellant argues that the Harsha Amendments, by adding "not to exceed" in § 207, manifest an intent to make the *allotment* (under § 205) discretionary. However, the imposition of a ceiling on authorized appropriations is not inconsistent with the Appellees' position concerning mandatory allotment. Logically, it could be interpreted to mean that the

amount obligated (later appropriated and expended) in any fiscal year *may* be less than the maximum amount authorized. We concede that the elimination of the word "all" from § 205(a) is a source of confusion. At least one court [18] has chosen to rely entirely upon this syntatical change, although there is no precise explanation of its meaning. We consider it more useful to examine the statements of sponsors purporting to explain the intended effect of the Harsha Amendments; we find that allotment remained mandatory.

Perhaps the clearest statement in the Congressional history is that of Senator Muskie in explaining the purpose behind the Harsha Amendments:

> In our last conference, the able and distinguished ranking minority member of the House Committee on Public Works offered two amendments which he indicated would reduce opposition to the bill from the White House and the Office of Management and Budget. These two amendments were accepted by your conferees and by other House conferees in order to remove the question of a veto on the basis of the money authorized by the legislation.
>
> Under the amendments proposed by Congressman WILLIAM HARSHA and others, the authorizations for obligational authority are "not to exceed" $18 billion over the next 3 years. Also, "all" sums authorized to be obligated need not be committed, *though they must be allocated*. These two provisions were suggested to give the administration some flexibility concerning the obligation of construction grant funds.
>
> The conferees do not expect these provisions to be used as an excuse in not making the com-

[18] Campaign Clean Water v. Ruckleshaus, Civil No. 18–73–R (E.D. Va. filed June 5, 1973) slip op. at 14.

> mitments necessary to achieve the goals set forth in the act. At the same time, there may be instances in which the obligation of funds to a particular project in a particular State may be contrary to other public policies such as the National Environmental Policy Act. In these cases the conferees would, of course, expect the administration to refuse to enter into contracts for construction.

118 *Cong. Rec.* S 16871 (daily ed. October 4, 1972) (emphasis added). Senator Muskie stated clearly that allotment [19] under the Act is to be mandatory.

Congressman Harsha, in explaining the meaning of his amendments, stressed that flexibility with regard to obligation was their purpose:

> Furthermore, I want to point out that the elimination of the word "all" before the word "sums" in section 205(a) and the insertion of the phrase "not to exceed" in section 207 was intended by the managers of the bill to *emphasize the President's flexibility to control the rate of spending.*

Id. at H 9122 (emphasis added). It is our belief that Congressman Harsha, by emphasizing that the President could "control the rate of spending," was clearly referring to control at the obligation stage. Had the amendments been designed to confer discretion at the allotment stage, Congressman Harsha could have so stated; furthermore the Congressman had clearly intended to obligate the entire $18 billion to meet the pollution problem [20] and his views as to the amend-

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[19] Senator Muskie's use of the term "allocate" vice the term "allot" is of no import. The Senate version of the bill had used the term "allocate." Appellants concede this point. *See* Brief for Appellant at 14.

[20] *See* Congressman Harsha's remarks at 118 Cong. Rec. H10268–69 appearing *supra* at 18.

ments must be read in light of his expressions of the total legislative intent.

The Harsha Amendments were further analyzed in a discussion among Congressmen Ford, Harsha, and Jones.[21]

> MR. GERALD R. FORD. Mr. Speaker . . . I think it is vitally important that the intent and purpose of section 207 is spelled out in the legislative history here in the discussion on this conference report.
>
> As I understand the comments of the gentleman from Ohio [Harsha], the inclusion of the words in section 207 in three instances of "not to exceed" indicates that is a limitation. More importantly that it is not a mandatory requirement that in 1 year ending June 30, 1973, there would be $5 billion and the next year ending June 30, 1974, $6 billion and a third year ending June 30, 1975, $7 billion *obligation or expenditure?*
>
> Mr. HARSHA. I do not see how reasonable minds could come to any other conclusion that *the language means we can obligate or expend up to that sum*—anything up to that sum but not to exceed that amount. * * *
>
> MR. GERALD R. FORD. Mr. Speaker, I would like to ask the distinguished chairman of the subcommittee and the chairman of the House conferees whether he agrees with the gentleman from Ohio (Mr. Harsha).
>
> MR. JONES of Alabama. . . . My answer is "yes." Not only do I agree with him, but the gentleman from Ohio offered this amendment which we have now under discussion in the committee of conference, so there is no doubt in anybody's mind of the intent of the language. It is reflected in the language just explained by the gentleman from Ohio (Mr. Harsha).

[21] Congressman Jones was Chairman of the House conferees and a floor manager for the bill.

> MR. GERALD R. FORD. Mr. Speaker, this clarifies and certainly ought to wipe away any doubts anyone has. *The language is not a mandatory requirement for full obligation and expenditure up to the authorization figure in each of the 3 fiscal years.*

Id. at H 9123 (emphases added).

From these statements, we draw the conclusion that the amendments were intended to grant the executive discretion in the *obligation* phase, not in the allotment phase. The President evinced a similar understanding in his veto message:

> Certain provisions of [the bill] confer *a measure of spending discretion and flexibility* upon the President, and if forced to administer this legislation I mean to use those provisions to put the brakes on budget-wrecking expenditures as much as possible.
>
> But the law would still exact an unfair and unnecessary price from the public. For I am convinced . . . that the pressure for full funding under this bill would be so intense that funds approaching the *maximum authorized* amount could ultimately be claimed and paid out, no matter what technical controls the bill appears to grant the Executive.

118 *Cong. Rec.* at S 18534–35 (daily ed. October 17, 1972) (emphases added). It is true that the President's statements concerning the Act are not to be given the weight accorded to statements by member of Congress. Nevertheless, it appears to have been the President's understanding that § 205 and § 207 conferred upon the Administrator only "spending discretion and flexibility." He evidently felt that since the sums had to be allotted and made available for obligation, public pressure could force him to obligate the funds.

After the veto, both Senator Muskie and Congressman Harsha again explained the effect of the amendments upon the allotment phase. Senator Muskie repeated his position that the Administrator must allot the sums authorized.[22] Congressman Harsha reiterated his explanation of the amendments to the House, stating:

118 CONG. REC. S 18547 (daily ed. October 17, 1972).

> Furthermore, Mr. Speaker, we have emphasized over and over again that if Federal spending must be curtailed, and if such spending cuts must affect water pollution control authorizations, the administration can impound the money.

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[22] *See* 118 CONG. REC. at S 18546, S 18549 (daily ed. October 17, 1972). Senator Muskie illustrated his specific understanding that all funds would be alloted by introducing a table of proposed expenditures premised entirely on *full allotment*. His remarks:

"With respect to the budget impact, let me give the Senate just one more factor to be included in the Record, a table showing the expenditures projected under this bill. I ask unanimous consent that it be included in the Record at this point.

"There being no objection, the table was ordered to be printed in the Record, as follows:

"*Rate of expenditures by fiscal year[a] under authorizations of S. 2770[b]*

"[in billions]

	Fiscal year—			
	1973	1974	1975	Total
Fiscal year:				
1973	$0.25			$0.25
1974	1.00	$0.30		1.30
1975	1.50	1.20	$0.35	3.05
1976	2.00	1.80	1.40	5.20
1977	.25	2.40	2.10	4.75
1978		.30	2.80	3.10
1979			.35	.35
Total	5.00	6.00	7.00	18.00

"[a] 1st year, 5 percent of authorization; 2d year, 20 percent of authorization; 3d year, 30 percent of authorization; 4th year, 40 percent of authorization; 5th year, 5 percent of authorization."

"[b] Fiscal year 1973, $5,000,000,000; fiscal year 1974, $6,000,000,000; fiscal year 1975, $7,000,000,000."

> I want to point out that the elimination of the word "all" before the word "sums" in section 205(a) and insertion of the phrase "not to exceed" in section 207 was intended to emphasize the President's flexibility *to control the rate of spending.*
>
> * * *.
>
> Second, I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications, and estimates. *This is the pacing item in the expenditures of funds.* It is clearly the understanding of the managers that under these circumstances the *Executive can control the rate of expenditures.*

118 *Cong. Rec.* H 10268 (daily ed. October 18, 1972) (emphases added). Congressman Harsha then explained the impact of the Act in future fiscal years:

> [T]he first major impact of obligations from the *$5 billion authorizations* for the fiscal year ending June 30, 1973, is in fiscal year 1975.
>
> * * *.
>
> As a matter of fact, for fiscal year 1973 *if all the money were obligated and placed under contract,* there would only be $20 million needed to meet the obligations. . . .

Id. (emphases added). It seems clear that Congressman Harsha's hypothetical concerning the *obligation* of the entire $5 billion requires an underlying assumption that all such sums *must be allotted* and thus available for obligation.

C. THE ADMINISTRATOR'S ARGUMENTS

At this point we turn to an analysis of the Administrator's arguments. We note that basically the Administrator argues an uncontested point, i.e. that the Ad-

ministrator has control over the "rate of spending."[23] Indeed, as we have observed *supra*, the appellee agrees and there is much legislative history to support this view.[24] The Administrator then argues that such conceded control over the "rate of spending" must mean control at the allotment stage. We disagree. In view of the seriousness of the question, we shall set forth the Administrator's various arguments fully.

First, the Administrator argues, Congressman Harsha, after explaining that the effect of the amendments would be to "emphasize the President's flexibility to control the rate of spending",[25] went on to state his belief that the President could "control expenditures" under the Act by the "same means" (commonly called "impoundment") as he controlled expenditures under the Federal-Aid Highways Act,[26] 23 U.S.C. §§ 101 *et seq.* (1970). By this, the Administrator argues, Congressman Harsha meant that "impoundment" includes a reduction in "allotments," as well as in "obligation." Therefore, it is argued, he intended to indicate that discretion would be available at the

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[23] We note, for example, that the caption of the Administrator's discussion of legislative history reads:

"C. *The Legislative History of Sections 205 and 207 Makes it Clear that Congress Understood that they were Designed to Confer Control Over the Rate of Spending on the Administrator.*"

Appellant's Br. at 11.

[24] *See, e.g.*, remarks of Congressman Harsha at 118 Cong. Rec. H 9122 (daily ed. October 4, 1972) reproduced fully *supra*.

[25] *Id.*

[26] "Furthermore, let me point out, the Committee on Public Works is acutely aware that moneys from the highway trust fund have been *impounded* by the Executive. Expenditures from the highway trust fund are made in accordance with similar contract authority provisions to those in this bill. Ob-

allotment stage. (Appellant's Brief at 11–12). We cannot agree. As the Administrator concedes, the statement reproduced in the margin *supra* at note 26 "present[s] some difficulty in interpretation" (Appellant's Br. at 12) because "impoundment" under the Federal-Aid Highways Act is achieved only by the limiting of contracts awarded (*i.e.* obligation). There is no possibility under that Act to reduce at the "allotment stage.[27] Whatever Congressman Harsha intended to explain, the two acts operate differently, and we believe that he could not have been arguing by analogy to discretion not conferred by the Highway Act. Congressman Harsha was referring to the obligation stage and not to allotment.[28]

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viously expenditures and appropriations in the water pollution control bill could also be controlled. However, there is even more flexibility in this water pollution control bill because we have added 'not to exceed' in section 207, as I indicated before.

"Surely, if the administration *can impound moneys* from the highway trust fund which does not have the flexibility of the language of the water pollution control bill, it can just *as rightly control expenditures from the contract authority produced in (t)his legislation by that same means.*"

118 CONG. REC. H 9122 (daily ed. October 17, 1972) (emphases added). *See also* 118 CONG. REC. H 10268 (daily ed. October 18, 1972).

[27] Called "apportionment" in the Highway Act. *See* 23 U.S.C. § 104 (1970).

[28] We note that it is unclear whether Congressman Harsha was aware of the district court decision in State Highway Commission of Missouri v. Volpe, 347 F. Supp. 950 (W.D. Mo. 1972), *aff'd*, 479 F. 2d 1099 (8th Cir., 1973). If he had an understanding of that decision which did not allow impounding *at the obligation stage*, he would have known that the Highway Act, with its different mechanisms, could not be an analog to the Act here. We point this out only to say that while we endeavor to read his words as he spoke them, there was, in fact, a court decision then in existence which had fully and carefully analyzed the Highway Act.

Next the Administrator attempts to explain the seemingly clear remarks of Senator Muskie that the Administrator must allot the full amounts authorized in section 207. The Administrator argues that the Senator's statement "'must be allocated' . . . seems to contradict the changes in sections 205(a) and 207, which relate only to allotment." (Appellant's Br. at 14.) We find this statement, appearing without explanation, meaningless. Senator Muskie was, by his own words, *explaining* to the Senate what the amendments meant. His words do not contradict anything at all; rather they seem to be a straightforward explanation of those amendments.

Next, the Administrator argues that Senator Muskie's remarks giving examples of instances where obligation may be controlled[29] amount to a "non-example". (Appellant's Br. 14.) We do not comprehend this argument. Senator Muskie gave as an example the situation where the obligation of funds for a particular project may be contrary to "other public policies such as the National Environmental Policy Act," and thus monies would be properly withheld. The Administrator apparently feels that, since there exists elsewhere in the Act a power[30] in the Administrator to disapprove projects which do not comply with NEPA, Senator Muskie could not have been

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[29] "The conferees do not expect these provisions to be used as an excuse in not making the commitments necessary to achieve the goals set forth in the Act. At the same time, there may be instances in which the obligation of funds to a particular project in a particular State may be contrary to other public policies such as the National Environmental Policy Act. In these cases the conferees would, of course, expect the Administration to refuse to enter into contracts for construction."

[30] *See* § 203 of the Act.

speaking of control of rate of spending. To the contrary, we consider this a proper illustration of the stage at which Congress intended executive control, *i.e.* at the *obligation* stage. The Senator's example supports this, and we understand it as such.
118 Cong. Rec. S 16871 (daily ed. October 4, 1972).

The Administrator alleges that Senator Muskie made a "serious error" in a colloquy with Senator Dominick during post-veto discussion of the Act.[31] The appellant claims that the Senator's statement that "there is plenty of flexibility in this bill for . . . the Congress to control spending" is at odds with the fact

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[31] "Mr. Dominick. Is my understanding correct that the amount authorized here is still subject to the appropriation process?

"Mr. Muskie. Funds are made available through contract authority which is subject to the control of the President and also the Committee on Appropriations. Yes. As a matter of fact, may I say to the Senator that the conferees adopted an amendment proposed by Congressman Harsha to indicate clearly the intent of Congress with respect to that point.

"Mr. Dominick. And so the Committee on Appropriations could by its action determine what contract authority the President would have. Is that correct?

"Mr. Muskie. Under the amendments proposed by Congressman William Harsha and others, the authorizations for obligational authority are 'not to exceed' $18 billion over the next 3 years. Also, 'all' sums authorized to be obligated need not be committed, though they must be allocated. These two provisions were submitted to give the administration some flexibility concerning the obligation of construction grant funds.

"Mr. Cooper. Mr. President, will the Senator yield briefly? I would like to be sure we are clear on this matter.

"Mr. Muskie. I yield.

"Mr. Cooper. Did I understand the question of the Senator from Colorado to be whether the Appropriations Committee could set a limit on the amount to be obligated?

"Mr. Dominick. That is the question I asked. I understood from the Senator from Maine that the answer was in the

not contested, that the statute does not permit "the Committee on Appropriations itself to set a limit on the amount committed under the statute."[22] Appellant argues, *sub silentio*, that Senator Muskie's basic understanding of the funding mechanism is apparently not to be trusted, and therefore, his numerous statements as to mandatory allotment are not to be credited. We find no such "serious error." In stating that the Appropriations Committee may "anticipate" the amount of contract authority under the Act, we agree with appellee that Senator Muskie was apparently doing no more than stating that the Appropriations Committee could report out a particular appropriations bill which would operate prospectively to limit the Administrator's authority to obligate amounts less than previously allotted. Such a mechanism has been recognized by the Senate Appropriations Committee in at least one context.[23] In any event, we are satisfied that Senator Muskie knew what he meant

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affirmative: that the Appropriations Committee could set that limit.

"Mr. Cooper. I thank the Senator. Out of this $24 billion $6 billion is not subject to contract obligation. Is that correct?

"Mr. Muskie. The Senator is correct. Mr. President, may I say in addition to the Senator from Colorado the amount of contract authority may be anticipated by the Appropriations Committee. That is, years in the future up to 1975 the Committee on Appropriations may set amounts which the administration may obligate in advance. So there is plenty of flexibility in this bill for the President and the Congress to control spending.

"Mr. Dominick. I thank the Senator for clarifying the record."

118 Cong. Rec. S 18546 (daily ed. October 17, 1972).

[22] Appellee's Br. at 28; Appellant's Br. at 17.

[23] *See* Senate Committee on Appropriations, Department of Transportation and Related Agencies Appropriations, S. Rep. No. 92-271, 92nd Cong., 1st Sess. 25-6 (1971).

when, in the *same dialogue* with Senator Dominick, he reiterated his understanding that "'all' sums authorized to be obligated need not be committed, though they must be allocated."

The Administrator next contends that the trial court's finding that Congress intended control over the rate of "obligation and expenditure" and not over allotments[34] must be erroneous because he asserts, "in terms of the impact on potential recipients control over allotments [*sic*] and control over obligations would have the same effect." (Appellant's Br. at 21.) We disagree emphatically. Discretion over allotments necessarily confers discretion over the amount *available to be spent* and thus grants the executive the power to contravene the oft-stated legislative purpose to make federal money available. Could the Administrator allot $0? Happily, this is not the case, but the Administrator suggests no limit on his alleged discretion not to allot. Such authority would be greater than the power to control the rate of expenditures to which the sponsors repeatedly referred. Further, discretionary allotment would not be consonant with the overall concern, clearly expressed,[35] of providing a total of $18 billion to combat water pollution. We find that discretion in obligation is distinctly different than discretion in allotment, and that it was only the former which this legislation was intended to confer.[36]

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[34] City of New York v. Ruckleshaus, *supra* n.10, J.A. at 66a.

[35] *See, e.g.*, text at 12–19 *supra*.

[36] Of course, it could be argued that discretion at any stage could contravene the basic purpose of the Act, *i.e.* to provide $18 billion to meet the pollution problem. We express no opinion as to whether or what extent the Administrator could legally withhold funds at the obligation stage; that question must await future resolution. *Compare* Georgia v. Nixon, No. 63, Original, *motion denied*, 42 U.S.L.W. 3193 (U.S. October 9, 1973). *See* n.39 *infra*.

Finally, the Administrator makes an argument to this court not made to the trial court. He does so apparently in response to the trial court's findings and reasoning with regard to § 205(b)(1) of the Act, the "reallotment" provisions. The trial court's statement of the perceived effect of § 205(b)(1) is reproduced in the margin.[37] The Administrator contends that the trial court erred in its assumption that reduced allotments have the effect of irrevocably denying state authorization while reduced obligation does not because, it is contended, allotments can be "augmented". (Appellant's Br. at 21.) We think that this is but another vehicle for a now familiar argument, *i.e.* that "allotment" control is identical with "obligation" control. Therefore, appellant concludes, a construction such as ours, which considers them separately must be erroneous.

We need not and do not reach the merits of this contention concerning "augmentation". The trial

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[37] Another feature of the Act which is of some importance in the resolution of issues before the Court is the reallotment provision in § 205(b)(1) of the Act. Once allotted to a State, sums are available for obligation for approved projects there 'for a period of one year after the close of the fiscal year for which such sums are authorized.' If for any reason the sums allotted are not fully obligated within that period, they are to be reallotted 'generally on the basis of the ratio used in making the last allotment of sums under this section.' Such reallotment sums remain available for obligation and are added to the State's allotment for the next fiscal year. Any sums authorized but not allotted at the appropriate time are lost to the State under the provisions of this Act. Thus, by refusing to allot the full sums authorized, the Administrator controls the absolute amount (as opposed to the rate) of spending without regard to the standards set forth in, e.g., § 204, for determining whether sums should be obligated.
New York City v. Ruckleshaus, *supra* n. 10, J.A. at 55a.

court's reasoning appears to us to be correct.[28] As to the contention of the Administrator, we further observe that the Act nowhere mentions any type of later augmentation procedure, and rather states in section 205(a) that "*the* allotment for fiscal year 1973 shall be made not later than . . . ." (Emphasis added.) However, believing as we do that there is a clear distinction under the Act between allotment and obligation and that there can be *no discretion* as to the former, we find it unnecessary to consider whether an allotment could be "augmented" in a later fiscal year; full allotment must be made in each fiscal year.

D. SECTION 206(f)(1)

Having considered the contentions of the Administrator as to the proper meaning of sections 205 and 207, we turn to yet another consideration which we find strongly supportive of our decision. It is elementary that a statute must be construed, if it is possible, to give effect to *all of the provisions. E.g., United States* v. *Menasche,* 348 U.S. 528, 538–39 (1955). Section 206(f)(1) of the Act allows the Administrator to obligate funds for a particular state's project even if the funds allotted to that state have been fully obligated. This is possible provided that "an authorization is in effect for the future fiscal year for which the application requests payment, which authorization will insure such payment without *exceeding the State's expected allotment from such authorization.*" (Emphasis added.) Section 206(f)(1) would have scant operative effect if the "state's expected

[28] *Accord,* Campaign Clean Water v. Ruckleshaus, Civil No. 18–73–R (E.D. Va. filed June 5, 1973) slip op. at 8, *reversed on other grounds,* Campaign Clean Water v. Ruckleshaus, —— F.2d ——, No. 73–1745 (4th Cir. December 10, 1973).

allotment" could not be known because the Administrator had discretion to allot only a portion of such authorization. This is further evidence of a legislative purpose to make allotment mandatory. In keeping with the basic principal of statutory construction represented in *Menasche*, we can see no other way to preserve the force of § 206(f)(1), save mandatory allotment.

V. Conclusion

The *only* question [39] before this court is whether the Administrator must make full allotments under the Act. Our reading of the revelant statutory language and careful analysis of the pertinent legislative history compells us to hold that § 205(a) of the Act requires the Administrator to allot the full sums authorized to be appropriated in § 207; [40] therefore, the decision of the trial court is

Affirmed.

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[39] There is no constitutional question in this case. Both sides have agreed that if this court determines that the Act requires full allotment there remains no constitutional power in the executive to limit the allotments because, in the words of appellant, "Allotment . . . is not an act that of itself commits the government to any obligation." (Appellant's Reply Br. to Supplemental Br. of Appellee at 2.) *See also* Supplemental Br. of Appellee at 3–6. *Compare* Georgia v. Nixon, et al., No. 63, Original, *motion denied*, 42 U.S.L.W. 3193 (U.S. October 9, 1973) which attempted to raise the question of the constitutionality of refusal to *obligate*.

[40] $5 billion for fiscal year 1973 and $6 billion for fiscal year 1974.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 73-1745

CAMPAIGN CLEAN WATER, INC., APPELLEE

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Robert R. Merhige, Jr., District Judge

(Argued October 2, 1973—Decided December 10, 1973)

Before HAYNSWORTH, *Chief Judge*, RUSSELL and FIELD, *Circuit Judges*.

RUSSELL, *Circuit Judge:*

Like a number of other pending actions,[1] this suit, brought by an environmental group concerned with

[1] *See, City of New York* v. *Ruckelshaus* (D.C. N.Y. 1973) 358 F. Supp. 669; *Brown* v. *Ruckelshaus and City of Los Angeles* v. *Ruckelshaus* (D.C.C.D. Cal. 1973) ——— F. Supp.

water quality in Virginia, involves the discretionary power, if any, of the defendant Administrator, Environmental Protection Agency, to allot appropriation authority for fiscal 1973 and 1974, particularly as those allotments relate to Virgina, under the provisions of Section 205 of the Federal Water Pollution Control Act Amendments of 1972.[2] The Act sets forth a comprehensive legislative program for controlling and abating water pollution.[3] In Subchapter II of that Act, provision is made for federal financial assistance to states and localities in planning and constructing sewage treatment plants, designed to assist in assuring the prompt attainment of specified standards of water quality.[4] Under Section 207 of that Subchapter,[5] grant authorizations[6] are made "for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, * * *." The grant authorizations in Section 207 are supplemented by Section 205 which provides for the allotment by the Administrator of such authorizations as approved among the States

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——— (decided 8/17/73): *Martin-Trigona* v. *Ruckelshaus* (D.C.N.D. Ill. 1973) ——— F. Supp ——— (decided June 28, 1973); *Minnesota* v. *USEPA* (D. Minn. 1973) ——— F. Supp. ———. (decided June 25, 1973).

[2] Section 1285, 33 U.S.C.

[3] Section 1251, *et seq.*, 33 U.S.C. The legislative history is set forth in U.S. Code Cong. & Adm. News, 92d Cong., 2d Sess., pp. 3668, *et seq.*

[4] Section 1281, *et seq.*, 33 U.S.C.

[5] Section 1287, 33 U.S.C.

[6] The statutes involved in this action concern not direct appropriations but what has often been described as "obligational authority". The Office of Management and Budget, in its listing of appropriated funds withheld from disbursement, omitted those represented by "obligational authority". *See, New*

on a statutorily stated formula "not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after October 18, 1972."

On November 22, 1972, the President wrote the Administrator directing the latter not to "allot among the States the maximum amounts provided by section 207"; specifically, he directed that, "[N]o more than $2 billion of the amount authorized for the fiscal year 1973, and no more than $3 billion of the amount authorized for the fiscal year 1974 should be allotted." In directing such action, the President referred to the fact that the Act "permits a significant increase over our programs to fund the construction of wastewater treatment facilities" and stated that budget requests for funding such construction under the earlier programs in fiscal 1973 amounted to "$2 billion". In fixing the allotments to be made under Section 205, the President observed that, "[T]hese amounts will pro-

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York Times, Feb. 6, 1973, at 1, col. 1 (city ed.). In principle, however, the difference between the two is unimportant, so far as the issues in this proceeding are concerned. As one commentator has aptly remarked, "Appropriations are passed in various forms, and permit actual expenditures as well as the incurring of obligations. However, there is another species of financial authority, the contract authorization [also termed obligational authority], which empowers the governmental unit only to incur obligations. Under such contract authority power, the agency will have to later request an appropriation to liquidate the obligations it has incurred." Note, *The Likely Law of Executive Impoundment*, 59 *Iowa L. Rev.* 50, 54 (1973). There is thus no reason to treat the two forms of authorizations other than as appropriations and to adjudge the right of the executive to withhold the same in both instances. *See*, Note, *Impoundment of Funds*, 86 *Harv. L. Rev.* 1505, 1506, n. 2 (1973).

vide for improving water quality and yet give proper recognition to competing national priorities for our tax dollars, the resources now available for this program and the projected condition of the Federal treasury under existing tax laws and the statutory limit on the national debt."

The plaintiff brought this action for both declaratory and injunctive relief in connection with the administration of the Act. By way of declaratory relief, it asked judgment that "(a) the defendant [Administrator] lacks the discretion to refuse to allott among the states the full sums authorized by Congress; or, alternatively, (b) the defendant abused whatever limited discretion he possesses by withholding a greater amount of funds than contemplated by the Congress under the Act." It, also, requested injunctive reiief, "directing the defendant to allot among the states the full sums of $5 billion and $6 billion authorized to be appropriated by section 207 of the Act for fiscal years 1973 and 1974." Without answering, the defendant Administrator moved to dismiss on the grounds "that the Court lacks jurisdiction over the subject matter of this suit and that the Complaint fails to state a claim upon which relief can be granted." At the same time, the plaintiff moved for summary judgment "on the grounds that there is no genuine issue as to any material fact and that, * * * plaintiff is entitled to judgment as a matter of law." After a hearing, the District Court denied the motion of the defendant to dismiss and granted in part the motion of the plaintiff for summary judgment.[7] From that decision, the defendant Administrator appeals. We remand for further proceedings.

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[7] The decision of the District Court is reported in 361 F. Supp. 689.

I.

The defendant Administrator at the outset raised a number of procedural barriers to the maintenance of this action. It put in issue the standing of the plaintiff to maintain this action, the justiciability of the issues, the prematureness of the proceedings, and finally, the bar of sovereign immunity. These claims were carefully considered in the thoughtful opinion of the District Court and were found meritless. For the reasons assigned by the District Court and for the reasons hereafter developed, we agree.

II.

Turning to the substantive controversy: The plaintiff concedes the Congress intended to give the executive certain discretion in making allotments under Section 205; the defendant Administrator asserts the existence of such discretion; and the District Court found that there was such discretion.[8] The existence

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[8] Thus the plaintiff in its brief, states the issues on appeal to be "whether, in passing the Federal Water Pollution Control Act Amendments of 1972, Congress intended to give the President boundless discretion to withhold funding under the Act, or whether, as plaintiffs contend and the district court held, the discretion granted the Executive is limited and was grossly exceeded."

While a number of courts have found a want of discretion in the Administrator in fixing the authorized allotments, the commentators on the Act are not as definite in their opinions. *See*, for instance, Note, *The Likely Law of Impoundment*, 59 *Iowa L. Rev.* 50, 55, n. 42 (1973) and Note, *Impoundment*, 86 *Harv. L. Rev.* 1505, 1526, n. 116; but *cf.*, Note, *Protecting the Fisc: Executive Impoundment and Congressional Power*, 82 *Yale L. J.* 1636, 1952. The issue of discretion, it is conceded by one of the commentators is plainly "arguable", something that cannot be said, it suggests, with reference to the appropriation made in

of discretion, therefore, is not in issue on this appeal. The point of controversy is the extent of that discretion and the power of the Court to review. The plaintiff, in the District Court, contended that the discretion granted by Congress to the Administrator was not "unbridled"; that specifically it was not broad enough "to give the Administrator the discretion to gut the Act."

In developing this contention, it emphasized the purposes and goals of the Act and argued that the Administrator's discretion may not be exercised in a man-

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support of the Federal Aid Highway Act, Section 101–44, 23 U.S.C., involved in *State Highway Commission v. Volpe* (8th Cir. 1973) 479 F.2d 1099, 50 *Iowa L. Rev.* at p. 55. In fact, Congress made it as plain as it could in the Highway Act that it intended to confer no right of impoundment on the executive. (*See* Page 1111, 479 F.2d.)

Ralph Nader, in his testimony before the Senate Ad Hoc Committee on Impoundments (hereafter referred to as *Impoundment Hearings*) ranged himself with those who found discretion in the executive in executing Section 205. He testified in this connection:

"Granted, the legislative history of these 1972 amendments suggests that Congress may have intended to grant the President limited discretion in controlling the level of obligations. However, the decisive overriding of the veto indicated a clear congressional mandate to have sufficient funds immediately available for obligation to meet the timetable for water quality goals which the act established." (at 34)

For a thoughtful statement of reasons for discretionary spending authority in the executive, *see* Fisher, *Presidential Spending Discretion and Congressional Controls*, appearing in the Winter, 1972, issue of *Law and Contemporary Problems* and quoted in *Impoundment Hearings*, at 719:

"The reform advocate is therefore advised to regard executive spending discretion as an essential, ineradicable feature of the budget process. Expenditures deviate from appropriations for a number of reasons. Appropriations are made many months, and sometimes years, in advance of expenditures.

ner and to an extent that the purposes of the Act are frustrated and nullified and that Courts have both the power and the duty to prevent such nullification. The defendant, on the other hand, took the position that, while the Administrator had not by his limited allotments frustrated the legislative purposes reflected in the Act, he has absolute discretion in making such allotments, and that his exercise of discretion is immune from judicial review. In resolving these conflicting positions, the District Court found that, on its face, an "impoundment policy,[9] by which 55% of the

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Congress acts with imperfect knowledge in trying to legislate in fields that are highly technical and constantly undergoing change.

"New circumstances will develop to make obsolete and mistaken the decisions reached by Congress at the appropriation stage. It is not practicable for Congress to adjust to these new developments by passing large numbers of supplemental appropriation bills. Were Congress to control expenditures by confining administrators to narrow statutory details it would perhaps protect its power of the purse but it would not protect the purse itself. Discretion is needed for the sound management of public funds."

But, *cf.*, the comment of the editor in 82 *Yale L.J.* 1636, at p. 1640, n. 26:

"It is important to note that this argument at its strongest only establishes a limited kind of impoundment power for the Executive, the power to impound when conditions intrinsic to the program indicate that further spending would be wasteful. There is no principle that would indicate that the President must necessarily have all impoundment powers or none at all."

[9] The term "impoundment" has provoked some disagreement. The editor in one recent Note would define it "as the executive practice of withholding appropriated funds or obligational authority, beyond the bounds of any statutorily conferred discretion." Note, 59 *Iowa L. Rev.* 50, 56 (1973). Similarly, Professor Miller defines it as "deliberate attempts to scuttle projects authorized by Congress, but disliked by the Executive."

allocated funds will be withheld, is a violation of the spirit, intent and letter of the Act and a flagrant abuse of executive discretion."[10] It found authority to declare judgment "that that policy is null and void".[11] Though it thus found the allotments as fixed by the Administrator invalid, it denied injunctive relief on the ground the Court was not equipped to "supervise the Administrator in the administration of the Act", partially because of "the expert discretion designed for the appropriations stage."[12] And, finally, it limited the application of its judgment "to those interests in Virginia represented by the plaintiff organization."[13]

As we have already stated, the right of the defendant to exercise discretion in making the allotment under Section 205 is not challenged by this appeal: that right is conceded. We are not concerned with the

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Impoundment Hearings, at 752. This would limit the application of the term to those acts of the Executive which represent an illegal withholding of appropriated funds. Other authorities use the term to identify any executive withholding of appropriated funds and make no effort to engage in the "semantic" game. Thus, in the Note, *Impoundment of Funds*, 86 *Harv. L. Rev.* 1505, n. 1, impoundment is defined as a "refusal by the executive, for whatever reason, to spend funds made available by Congress." Another writer uses similar language, stating that, "In its broadest context, impoundment occurs whenever the President spends less than Congress appropriates for a given period." Fisher, *Funds Impounded by the President: The Constitutional Issue*, 38 *Geo. Wash. L. Rev.* 124 (1969). This would seem the more sensible definition. Under this definition, any withholding would be an impoundment and whether such impoundment was permissible would depend on the legislative intent.

[10] 361 F.Supp. at 700.

[11] 361 F.Supp. at 700.

[12] 361 F. Supp. at 700.

[13] 361 F. Supp. at 701.

question whether an appropriation, either by its very nature [14] or under the terms of the Antideficiency Act,[15] even in the absence of any expressed grant of executive discretion in its use, involves some element of discretion in the executive. We are dealing here with a legislative provision which it has been held (and from this holding there is no appeal) does vest the executive with discretion. In short, the issues on this appeal are whether, accepting the holding that there was discretion in this case, its exercise is judicially reviewable, and, if reviewable, what standards or criteria are to be used in assessing the validity of its exercise. Those are the only issues posed by the appeal.

It is the defendant's position that, by conceding executive discretion in the fixing of the allotments under Section 205, the plaintiff has admitted a want of judicial power to review his exercise of that dis-

[14] It has been sometimes stated that an appropriation is "*permissive* rather than *mandatory*", by which the author states "it is meant that the Executive Branch is *authorized* but not *required* to spend funds up to a given amount for designated purposes." (Italics in text.) Miller, *Presidential Power to Impound Appropriated Funds: An Exercise in Constitutional Decision-Making*, 42 *N.C. L. Rev.* 502, 511 (1965). In somewhat similar vein, Professor Corwin summed the matter up with the statement that the Constitution "assumes any expenditure is primarily an executive function, and conversely that the participation of the legislative branch is essentially for the purpose simply of setting bounds to executive discretion—a theory confirmed by early practice under the Constitution." Corwin, *The President: Office and Powers*, 127–8 (4 ed. 1957).

See, also, McKay v. Central Electric Power Cooperative (D.C. Cir. 1955) 223 F.2d 623, 625.

[15] Section 665, 31 U.S.C. This section authorizes the executive to withhold funds "to provide for contingencies, or to effect savings whenever *savings* are made possible by or through changes in requirements, greater efficiency of operations, or *other developments* subsequent to the date on which such appro-

cretion. He rests this argument upon Section 10 of the Administrative Procedure Act,[16] which provides that administrative action, the exercise of which is "committed to agency discretion" is not judicially reviewable. *Cf.*, Davis, *Administrative Law Treatise*, 1970 Supp., § 28.16, p. 964. What the defendant urges is similar to the administrator's argument in *Overseas Media Corporation v. McNamara* (D.C. Cir. 1967) 385 F.2d 308, 316, n. 14, *i.e.*, that we should "adopt the view that the [legislative] act of committing a matter to an agency's discretion forecloses court consideration of an alleged abuse of that discretion"

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priation was made available" (Italics added, 665(c)(2).) Two constructions of the terms "savings" and "other developments" have been advanced. Under a narrow view, these terms relate to "developments within the individual programs involved, and that impoundment is only permissible to the extent that it does not interfere with achieving the underlying purposes of the program involved." Note, *Impoundment*, 86 *Harv. L. Rev.* at p. 1517 (1973). "According to a more expansive view, however, 'other developments' should refer to any subsequent development, whether or not uniquely program related, which would, in the administrator's mind, call for the making of savings through reduced program expenditure. A determination that a subsequent situation of inflation justified program reduction or termination in order to cut government spending would fit into this category." Note, *The Likely Law of Executive Impoundment*, 59 *Iowa L. Rev.* 50, 67 (1973). Most commentators, however, lean to the narrow view. *See* 86 *Harv. L. Rev.* 1517; 59 *Iowa L. Rev.* 67; 82 *Yale L. J.* 1642.

Mr. Fisher in an article quoted in the *Impoundment Hearings*, p. 399, takes this narrow view of the application of the Act. In support he quotes from the language of House Appropriations Committee in reporting the Act:

"It is perfectly justifiable and proper for all possible economies to be effected and savings to be made. But there is no warrant or justification for the thwarting of a major policy of Congress by the impounding of funds."

[16] Section 701, 5 U.S.C.

under any circumstances. To that argument, the Court in *Overseas* replied firmly, "The Legislative history of the Administrative Procedure Act belies this position."[17] And this conclusion in *Overseas* was confirmed in *Citizens to Preserve Overton Park v. Volpe* (1971) 401 U.S. 402, 410, where, speaking of this exception, the Court characterized it as "a very narrow exception", whose application, according to "[T]he legislative history of the Administrative Procedure Act" is limited to "those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" In resolving whether the matter falls within that "rare" instance in which the executive action is non-reviewable, the problem is "that of determining when the agency action is 'committed to agency discretion' within the meaning of section 10 of the Administrative Procedure Act, and when it merely 'involves' discretion which is nevertheless reviewable." *Ferry v. Udall* (9th Cir. 1964) 336 F.2d 706, 711, *cert. denied* 381 U.S. 904. Unquestionably, whether an agency, in exercising its asserted discretionary power under a legislative authorization, is acting in a manner consistent with the legislative purpose and with proper regard for the constitutional principle of separation of powers between the executive and legislative is an issue that Section 10 did not intend to make non-reviewable; it patently is not an issue "committed to agency discretion". *See,* Note, *Protecting the Fisc: Executive Impoundment and Congressional Power,* 82 *Yale L. J.* 1636, at p. 1647; *DeVito v. Shultz* (D.C. Cir. 1969) 300 F. Supp. 381, 38[illegible] *Hamel v. Nelson* (D.C. Cal. 1963) 226 F. Supp. 96, 98. The power to spend rests

[17] 385 F. 2d at 316, 317, n. 14.

primarily with Congress under the Constitution;[18] the executive, on the other hand, has the constitutional duty to execute the law in accordance with the legislative purpose so expressed.[19] When the executive exercises its responsibility under appropriation legislation in such a manner as to frustrate the Congressional purpose, either by absolute refusal to spend or by a withholding of so substantial an amount of the appropriation as to make impossible the attainment of the legislative goals,[20] the executive trespasses beyond the range of its legal discretion and presents

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[18] Article I, Section 9, Clause 7, Constitution.

[19] Article II, Section 3, Constitution.

See, also, Spaulding v. Douglas Aircraft Co. (D.C. Cal. 1945) 60 F. Supp. 985, 988, aff. 154 F. 2d 419:

"The purpose of the appropriations, the terms and conditions under which said appropriations were made, is a matter solely in the hands of Congress and it is the plain and explicit duty of the executive branch of the government to comply with the same."

[20] See statement of then Assistant Attorney General Rehnquist, quoted in the Impoundment Hearings, at 609:

"'It is in our view extremely difficult to formulate a constitutional theory to justify a refusal by the President to comply with a Congressional directive to spend. It may be argued that the spending of money is inherently an executive function, but the execution of any law is, by definition, an executive function, and it seems an anomalous proposition that because the Executive Branch is bound to execute the laws, it is free to decline to execute them.' *Memorandum Re Presidential Authority to Impound Funds Appropriated for Assistance to Federally Impacted Schools* (Dec. 1, 1969), reprinted in *Impoundment Hearings* at 279, 283."

It may be said, too, that, by absolutely refusing to spend or obligate funds appropriated by Congress, the executive is for all practical purposes exercising an "item veto", terminating or delaying a particular program, thereby avoiding the embarrassment of a public veto message with the risk of a Congressional overriding.

an issue of constitutional dimensions which is obviously open to judicial review. And it was this issue and this issue alone to which the District Court carefully restricted itself in this case. It specifically denied any power on its part to review or supervise the defendant's discretion so far as it was exercised in a manner that was not so arbitrary or drastic as to represent a nullification of legislative purpose.[21] We agree generally with this construction of its power by the District Court.[22]

Our only difficulty with the decision of the District Court relates to its conclusion on the issue of arbitrary frustration of legislative policy by the executive action taken. The District Court found that an allotment under Section 205 in the amount of

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[21] *Cf., Housing Auth., San Francisco v. United States Dept., H.U.D.* (D.C. Cal. 1972) 340 F. Supp. 654, 656; Church, *The Impoundment of Appropriated Funds: The Decline of Congressional Control Over Executive Discretion*, 22 *Stan. L. Rev.* 1240, 1252 (1970); Boggs, *Executive Impoundment of Congressionally Appropriated Funds*, 24 *U. of Fla. L. Rev.* 221, 228 (1972); and Stassen, *Separation of Powers and the Uncommon Defense: The Case Against Impounding of Weapons System Appropriations*, 57 *Geo. L.J.* 1159, 1201 (1969); and Miller, *Presidential Power to Impound Appropriated Funds: An Exercise in Constitutional Decision-Making*, 43 *N.C.L. Rev.* 502, 536 (1965).

The court's power is well stated in 82 *Yale L.J.* at p. 1651:

"The court need not seek to derive some lower figure but need simply test the contested impoundment against the legislative intent as expressed in the act to determine whether the impoundment was an abuse of discretion. It will derive its own construction of the statute then test the administrative action to see whether it could rationally be a carrying out of the Act's mandate."

[22] Of course, in the exercise of his discretion, the Administrator may not consider factors that are irrelevant to the legislative intent. *Overton Park, supra* (401 U.S. at 416).

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55% of the authorization under Section 207, established such a drastic and arbitrary administrative reduction in the contract authorization as, on its face, without any other evidentiary support, to require a finding of executive nullification of the purposes of the Act. With this factual finding, we are unable to agree. The statement of the President must be read in conjunction with the explanation given by the Administrator both in his presentation to this Court and in his Congressional appearances, for his allotments as made. In his presentation to this Court, the Administrator has disclaimed any purpose of evading the responsibilities given him under the Act. In his appearance before the Senate *ad hoc* Subcommittee on Impoundment of Funds on February 6, 1973,[23] where he defended the allotments made for the years in question here, he forcefully expressed his commitment to the goals intended by the Act[24] and affirmed that the reductions in the contract authorizations, as represented by the allotments made by him under Section 205 for fiscal years 1973 and 1974, were arrived at on the basis of an administrative judgment that greater authorizations could not be spent "in a wise or expeditious manner"[25] in achieving such goals during those years.

This judgment was based, in turn, he testified, on a conclusion that "there was not sufficient technical capacity, technical capability, I think it was, or contractual capacity" to carry out a greater or more extensive program.[26] In reaching that conclusion, he had taken note, according to his testimony, that there

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[23] *Impoundment Hearings*, at 403, *et seq.*

[24] *Ibid*, p. 405.

[25] *Ibid*, p. 413.

[26] *Ibid*, p. 416.

were already available other contract authorizations for the same purposes as that authorized under the Act, which, when added to the authorizations actually allotted by the Administrator, meant that "there was $7.25 billion released on the 27th of November [1973] to be spent over the next 18 months" in meeting the goals of the program.[27] He argued that to attempt a more rapid rate of spending would inordinately inflate the cost of the program without appreciably accelerating the attainment of its goals. He pointed out in partial confirmation of this opinion that "the construction industry has inflated the cost of the building of the project at the rate of 120 percent", while at the same time "the cost of living has gone up at the rate of 40 percent."[28]

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[27] *Ibid*, p. 416.

[28] *Ibid*, pp. 416–417.

In connection with this latter statement of the Administrator, it may be observed that one of the disputed issues in some of the controversies over executive impoundments concerns whether there is legislative warrant under the particular legislation for the executive to consider the need to thwart general inflationary tendencies in the economy in determining a withholding of appropriations. The claimed basis for the exercise of such power is stated by the Department of Justice in its reply to certain questions propounded by the Chairman in the *Impoundment Hearings*, pp. 837–8. It is not clear whether this issue is present here. It is possible to interpret the testimony of the Administrator as indicating that it was the unique, inflationary forces prevalent at the moment in that part of the construction industry involved in sewage plant development which were considered by him. Actually, however, the general objection to impoundment on the part of the Congress seems to be directed at the re-ordering of priorities as a result of impoundment. Thus, the Chairman of the Subcommittee at the *Impoundment Hearings*, Senator Erwin, after quoting from Mr. Fisher to the effect that, "Impoundment is not being used to avoid deficiencies, or to effect savings, or even to fight inflation, but rather to shift the

The Administrator, also, asserted in his brief, without contradiction by the plaintiff, that as of August 31, 1973, all of the States had utilized but 73 percent of their 1973 allotments and 8 percent of their 1974 allotments. There is no way for us at this juncture to venture an opinion whether the Administrator had been "dragging his feet" in approving projects or whether these figures indicate that the allotments made represented reasonable goals for the two fiscal years in controversy. The experience in the use of the allotments so far in fiscal 1973 and 1974 is, though, a matter that might well be considered in determining whether the Administrator, in exercising his discretion under Section 205, acted so arbitrarily as to frustrate the attainment of the legislative goals.

Moreover, it must not be overlooked that the Administrator claims the power to increase allotments during a fiscal year and has declared in this Court that, should it appear that the allotments made for fiscal years 1973 and 1974 are not sufficient to support the applications made and qualifying under the standards established, he will give consideration to making additional allotments out of the maximum authorizations provided by Section 207.[29]

The Act itself grants contract authorizations for the fiscal years 1973– 1974– 1975 in the overall amount of $18 billion. It provides for reallotment of unused allotments. The defendant asserts that, considered as a whole, the Act gives the defendant the power to add to allotments for any fiscal year, within, of course, the

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scale of priorities from one Administrator to the next, prior to Congressional action." said, "That is our complaint." *Impoundment Hearings*, p. 277.

[29] This procedure, if followed, it could be argued, would carry out the Congressional intent.

legislative maximums, as the need demonstrates. Because he claims there has been no denial of any qualified project in either fiscal year 1973 or fiscal year 1974, there is no demonstrable need for an increase in the allotments heretofore made. Moreover, he avers without contradiction by the plaintiff that no qualified project for the Commonwealth of Virginia has been denied contract authorization during fiscal 1973 or 1974. He goes further and asserts that if there are qualifying projects from Virginia in the fiscal years in question that exceed the allotments already made, the plaintiff has suffered no prejudice or injury unless he [the Administrator] refuses to make additional allotments to cover qualifying projects in Virginia in the two fiscal years in question.

It is true, as the plaintiff argues, that Section 205 declares that allotments are to be made no "later than the January 1st immediately preceding the beginning of the fiscal year for which authorized" but the defendant presses the point that this provision simply establishes a date for initial allotments and was not intended and does not represent a restriction on the defendant's right, if the need develops, to add to or to increase the allotments as initially made.[30] Whether this construction is sound—and we are strongly persuaded that it is—it would seem unlikely that any party would have standing successfully to challenge any increase made by the Administrator in the initial allotment. In any event, this is an issue that should be given consideration in determining whether the action of the Administrator was arbitrary.

These observations do not establish that the District Court's conclusion was incorrect; they do indicate, though, that the issue in controversy here is not one

[30] *See, Impoundment Hearings*, pp. 840–1.

to be resolved by any *per se* rule but is one that requires inquiry into the basis for the Administrator's action. After all, there is a presumption of legality that attaches ordinarily to an administrator's action and the burden of establishing impropriety rests on him who challenges. Even if the District Court had concluded, as some other courts have, that the Administrator was without discretion in making allotments under Section 205, he would still have been empowered under the terms of the Antideficiency Act "to withhold funds for reasons of efficiency and economy"; and, if the plaintiff wished to challenge an impounding of funds made under the authorization of the Antideficiency Act, it would have had the burden of showing "that the impoundment was in fact not warranted by efficiencies or other new developments", and *pari passu*, it would seem to follow that "a plaintiff challenging an assertion that the executive has discretion to impound under a particular spending bill must show that the discretion granted was less than that claimed". Note, *Impoundment of Funds*, 86 Harv. L. Rev. 1505, 1529 (1973).

Beyond the bare assumption that an expenditure of approximately half the authorized appropriation establishes a frustration of legislative purpose the plaintiff has done nothing to satisfy its burden. Such an assumption, in the face of other circumstances to which we have adverted, and recognizing that the District Court has found at least some discretion in the Administrator to fix the allotment, is insufficient to support the conclusion reached by the District Court that the allotments made were "a violation of the spirit, intent and letter of the Act and a flagrant abuse

of executive discretion", or involved a use of irrelevant factors in arriving at his action. That issue should not have been resolved on the pleadings but a record should have been made that would support the conclusion reached by the District Court.[31] We accordingly remand to the District Court for further proceeding in order to determine, on the basis of such evidence as may be submitted by the parties, whether as a fact the amount of allotments made by the Administrator under Section 205 were "a violation of the spirit, intent and letter of the Act and a flagrant abuse of executive discretion", or involved irrelevant or improper standards in fixing such amount. In connection with that inquiry, it will be appropriate for the District Court to consider whether the factors used by the defendant in fixing the allotments were the ones that were "relevant" under a proper construction of the discretionary power found to exist in the executive.[32]

REMANDED WITH DIRECTIONS

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[31] *Cf., State of Minnesota v. United States Environmental Protection Agency* (D.C. Minn. 1973) — F. Supp. — (decided June 25, 1973), in which the plaintiff, complaining, as the plaintiff does here, that the allotments were improper as they applied to it, offered in affidavit form, proof that projects in its state had qualified for grant but were being denied approval because of the paucity of the allotment.

[32] *See, Citizens to Preserve Overton Park v. Volpe, supra*, at 420 (401 U.S.).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 73-1705

SEPTEMBER TERM, 1973—CIVIL ACTION 2466-72

THE CITY OF NEW YORK ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES WITHIN THE STATE OF NEW YORK CITY OF DETROIT, (PARTY PLAINTIFF)

v.

RUSSELL E. TRAIN, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

Appeal from the United States District Court for the District of Columbia

Before: TAMM, ROBINSON and WILKEY, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment _____ of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam—For the Court:

HUGH E. KLINE,
Clerk.

Date: January 23, 1974.

Opinion for the Court filed by *Circuit Judge* TAMM.

APPENDIX D

United States Court of Appeals for the Fourth Circuit

No. 73-1745

CAMPAIGN CLEAN WATER, INC., APPELLEE

v.

RUSSELL E. TRAIN, ADMINISTRATOR, ENVIRONMENTAL PROTECTION AGENCY, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA.

JUDGEMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court that the case is remanded to the United States District Court for the Eastern District of Virginia, at Richmond for further pro-

ceedings consistent with the opinion of this Court filed herewith.

Filed December 10, 1973.

WILLIAM K. SLATE, II,
Clerk.

A True Copy, Testes.

WILLIAM K. SLATE, II,
Clerk.

VIRGINIA LIPFORD,
Deputy Clerk.

APPENDIX E

THE CITY OF NEW YORK, ON BEHALF OF ITSELF AND ALL OTHER SIMILARLY SITUATED MUNICIPALITIES, PLAINTIFF,
THE CITY OF DETROIT, PLAINTIFF-INTERVENOR
v.
WILLIAM D. RUCKELSHAUS, AS ADMINISTRATOR OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEFENDANT

Civ. A. No. 2466-72

United States District Court, District of Columbia,
May 8, 1973

GASCH, *District Judge:*

This is an action for a declaratory judgment and mandamus to compel the defendant, William D. Ruckelshaus, until recently Administrator of the United States Environmental Protection Agency ("the Administrator") to comply with the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816 (hereafter termed "the Act").[1] Plaintiff is

[1] This action was originally brought against William D. Ruckelshaus, who was serving as Administrator at that time. During the pendency of the action, Mr. Ruckelshaus resigned and his successor has not yet been appointed and confirmed. By operation of Rule 25(d), Fed. R.Civ.P., the Acting Administrator is automatically substituted as the defendant. The action

the City of New York, suing on behalf of itself and all similarly situated municipalities within the State of New York. The City of Detroit has been granted leave to intervene as a party plaintiff seeking the same relief. The action is brought pursuant to § 505(c) of the Act and 5 U.S.C. §§ 701–706; jurisdiction is alleged on the grounds of 28 U.S.C. §§ 1331, 1332, and 1361.

Plaintiff and plaintiff-intervenor allege that § 205 (a), taken together with § 207, of the Act requires the Administrator to allot among the states the sums of $5 billion for fiscal year 1973 and $6 billion for fiscal year 1974, thereby making such sums available for obligation on sewage treatment works construction approved by the Administrator for federal funding. It is further alleged that the Administrator has violated this statutory requirement by promulgating, at the express direction of the President of the United States, a regulation, effective December 8, 1972,[2] which allotted among the states for fiscal years 1973 and 1974 "sums not to exceed $2 billion and $3 billion respectively." The case is now before the Court on plaintiff's motion to determine that this suit may be maintained as a class action, defendant's motion to dismiss, and the motions of plaintiff and plaintiff-

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continues unabated unless the new Administrator comes forward with evidence showing such a discontinuance of his predecessors' policy as to make the action moot. *See* Rule 25(d), 1961 Notes of the Advisory Committee on Rules; 3B J. Moore, Federal Practice, ¶ 25.09[3], at 25–402 (2d ed. 1969). Since no such showing has been made in the instant case, the actions of Mr. Ruckelshaus are chargeable to the Acting Administrator for purposes of this action, and the Court's order is binding upon the Acting Administrator and his successors in office.

[2] 37 Fed.Reg. 26282, § 35.910–1(a) 1972.

intervenor for summary judgment.[3] Also before the Court for consideration are the pleadings, oppositions, affidavits, and argument by counsel in open Court.

The Court's characterization and analysis of the issues in the case will be clearer if the mechanism set up under the Act for funding the construction of sewage treatment works is briefly outlined. The Act reverses the normal procedure whereby sums are appropriated by Congress and thereafter contractually obligated by the appropriate agency. Instead, Congress has, in § 207, authorized certain specific sums to be appropriated to carry out the purposes of Title II of the Act, Grants for Construction of Treatment Works. The Administrator is required by § 205 to allot the sums among the states according to a time schedule and needs formula set up under the Act.[4] (Whether the full sums authorized to be appropriated must be allotted or only a portion of them—the size of the portion being within the Administrator's discretion—is the central issue disputed by the parties.) Once allotted, the sums become available for obligation, i.e., contract authority exists up to those amounts. The Ad-

[3] The contentions of the plaintiff-intervenor are substantially the same as those made by the plaintiff. In the interest of brevity, references throughout will be solely to the plaintiff unless the context requires otherwise.

[4] According to § 205(a) sums are to be allotted among the States "in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States." Congress has supplied the figures for determining the ratios to be used for the fiscal years ending June 30, 1973, and June 30, 1974. (Table III of House Public Works Committee Print No. 92-50). For subsequent fiscal years, the allotments are to be made in accordance with a revised cost estimate submitted by the Administrator to Congress and "approved by law specifically enacted hereafter."

ministrator reviews grant applications submitted by States and municipalities for federal funding of particular waste treatment projects to determine whether they satisfy criteria set forth in the Act, e.g., in § 204. Once the Administrator approves the plans, specifications, and estimates for a project, a contractual obligation arises to pay the federal share allocable to that project.[5] Funds are then appropriated to liquidate the obligations as they fall due; the final step, actual disbursement of the funds, is then made. It is clear from this sequence that *allotment* is not tantamount to *expenditure* or even commitment of the funds.

Another feature of the Act which is of some importance in the resolution of issues before the Court is the reallotment provision in § 205(b)(1) of the Act. Once allotted to a State, sums are available for obligation for approved projects there "for a period of one year after the close of the fiscal year for which such sums are authorized." If for any reason the sums allotted are not fully obligated within that period, they are to be reallotted "generally on the basis of the ratio used in making the last allotment of sums under this section." Such reallotted sums remain available for obligation and are added to the State's allotment for the next fiscal year. Any sums authorized but not allotted at the appropriate time are lost to the State under the provisions of this Act. Thus, by refusing to allot the full sums authorized, the Administrator controls the absolute amount (as opposed to the rate) of spending without regard to the standards set forth in, e.g., § 204, for determining whether sums should be obligated.

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[5] Section 202(a) sets the federal share of the cost of construction of projects, as approved by the Administrator, at 75 percent. Section 203 of the Act specifies that the Administrator's approval creates contractual obligations on the part of the United States.

Having set forth the framework of the Act within which the dispute now before the Court has arisen, the Court will proceed to the issues. First to be dealt with are jurisdictional issues raised in the defendant's motion to dismiss and his opposition to plaintiff's motion for summary judgment. Defendant contends that this Court lacks the requisite jurisdiction because the doctrine of sovereign immunity bars the suit and because the action fails to present a justiciable case or controversy. The Court does not agree with these contentions and will deal with them only briefly.[6]

Two well-settled common law exceptions to the doctrine of sovereign immunity are set forth in two cases cited by defendant, Dugan v. Rank, 372 U.S. 609, 621–622, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963), and Larson v. Domestic & Foreign Commerce Corporation, 337 U.S. 682, 689–690, 69 S.Ct. 1457, 93 L.Ed. 1628 (1949); and plaintiff's action falls squarely within the exception covering suits challenging actions by federal officers which go beyond the scope of their statutory powers. Defendant is not aided by the general rule set forth in Land v. Dollar, 330 U.S. 731, 738, 67 S.Ct. 1009, 1012, 91 L.Ed. 1209 (1947), to the effect that where the judgment sought "would expend itself on the public treasury or domain, or interfere with the public administration," the suit is in reality brought against the sovereign; for as subsequent dis-

[6] It should be noted that these same contentions were made recently in motions to dismiss by the defendant in three consolidated civil actions before Judge Jones of this Court. Local 2677, American Federation of Government Employees v. Phillips, 358 F.Supp. 60 (D.D.C., 1973). In those suits, as in the instant case, plaintiffs were challenging the actions of a federal officer on the ground that they were in violation of his statutory authority; Judge Jones rejected the defendant's contentions and proceeded to the merits of the case.

cussion will reveal, the relief sought by plaintiff in this action does not require the *expenditure* of unappropriated public funds (or indeed of any public funds at all), nor will it interfere with the lawful exercise of defendant's discretionary powers under the Act.

A second reason for rejecting the sovereign immunity defense as a bar to this action is the fact that plaintiff is seeking review in part on the basis of the Administrative Procedure Act, 5 U.S.C. §§ 701–706; the rule in this Circuit is that the A.P.A. constitutes a waiver of sovereign immunity in actions to which it applies. Scanwell Laboratories, Inc. v. Shaffer, 137 U.S.App.D.C. 371, 385, 424 F.2d 859, 873 (1970); Constructores Civiles de Centroamerica, S.A. v. Hannah, 148 U.S.App.D.C. 159, 459 F.2d 1183 (1972). Defendant has sought to distinguish *Scanwell* by contending that there was no question there of any "disposition" of government funds, whereas the instant case presents a "demand" for such funds. As already indicated, this argument must fail because defendant has misconstrued the nature of the relief sought. Plaintiff is demanding only that funds be *allotted* as, in its view, Congress required.

Defendant contends that this action fails, for two reasons, to present a justiciable case or controversy. First it is argued that the action is hypothetical and premature and hence does not fall within the limits of federal court jurisdiction as defined by Article III of the Constitution. It is true that Article III confines federal courts to the adjudication of cases and controversies and forbids the rendering of advisory opinions. Golden v. Zwickler, 394 U.S. 103, 108, 89 S.Ct. 956, 22 L.Ed.2d 113 (1969). Where a declaratory judgment is sought, the plaintiff must show a "substantial controversy between parties having adverse legal in-

terests of sufficient immediacy and reality" to warrant its issuance. Maryland Casualty Company v. Pacific Coal & Oil Company, 312 U.S. 270, 273, 61 S.Ct. 510, 512, 85 L.Ed. 826 (1941). Defendant contends that because plaintiff has no guarantee that projects for which it seeks funding under the Act will be approved, refusal to allot, and thus make available for obligation, the full amounts authorized to be appropriated in § 207 of the Act does not amount to action that is adverse to any real or immediate interests of plaintiff. This argument fails on several grounds. Plaintiff has filed an affidavit of the Commissioner of the Department of Water Resources for the City of New York averring that the City has received approval from the United States Environmental Protection Agency (EPA) for two waste treatment projects, and that because of the reduced allotments, plaintiff's share of available federal funds "will permit only a token start toward completion." (Affidavit of Martin Lang dated April 3, 1973, ¶¶5–6).[7] Defendant has not disputed these assertions of fact.

Even were plaintiff's grant application still under study, however, there would be more than a merely speculative injury; for as affidavits filed by both plaintiff and plaintiff-intervenor indicate, the reduction in allotments has resulted in serious planning delays that will necessarily retard the development of sewage treatment facilities. (Affidavit of Martin Lang, dated February 8, 1973, ¶11; affidavit of Gerald Remus, dated March 15, 1973, ¶12). The seriousness of the planning problem was understood by Congress. It was

[7] Attached as Exhibit "B" to the affidavit is a copy of a letter dated March 1, 1973, from Gerald M. Hansler, Regional Administrator, EPA, announcing approval of the plaintiff's grant application for the two projects.

one of the reasons for utilizing the device of allotment, thereby making funds available for obligations, in lieu of the ordinary appropriations procedure.

Congressman William Harsha, one of the managers of the bill, observed during debate on a proposed amendment to H.R. 11896 [8] which would have substituted the normal appropriations process for the allotment mechanism that "it is essential that the States, the interstate agencies and the cities have both the ability for and a basis for long-range planning, construction scheduling and financing waste treatment plants, including the sale of bonds that they have to sometimes negotiate." 118 Cong. Rec. H2727 (daily ed. March 29, 1972). When there is uncertainty concerning how much will be allotted in a given year, municipalities cannot properly plan the scale of projects for which to seek federal funding.

Still another way in which plaintiff is injured by the Administrator's refusal to allot the full amount of the sums authorized to be appropriated by § 207 lies in the permanent loss of funds not allotted at the appropriate time. Such funds can not thereafter be made available for obligation even if grant applications which, in the Administrator's determination, meet all the requirements of the Act are submitted and the current allocations are insufficient to pay the authorized federal share.

Considering all of the ways in which plaintiff's interests are imminently threatened by the Administrator's action under challenge here, it seems clear that there exists an injury sufficiently concrete to create a real controversy in which plaintiff has a

[8] H.R. 11896 was the House version of the bill later enacted as P.L. 92-500, 86 Stat. 816, the provisions of which are disputed in the instant case.

genuine stake; and in ruling on the legality of the Administrator's action alleged to be the cause of this injury, the Court is not rendering a mere advisory opinion.

Defendant's other ground for urging the Court to find the subject matter of this action nonjusticiable is the contention that the matter at issue is a "political question" which the Court is barred from considering by reason of the doctrine of separation of powers. Certainly it is true that this Court could not decide a case if it presented a political question. Powell v. McCormack, 395 U.S. 486, 518, 89 S.Ct. 1944, 23 L.Ed.2d 491 (1969); Coleman v. Miller, 307 U.S. 433, 59 S.Ct. 972, 88 L.Ed. 1385 (1939). Criteria to be used in determining whether a political question is presented have been set forth by the Supreme Court in Baker v. Carr, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962). There Mr. Justice Brennan, writing for the majority, declared:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

The Administrator contends that at least two of the considerations listed by Mr. Justice Brennan are

applicable to the instant case, namely, (1) something "very close" to a "textually demonstrable" commitment of power to control spending in the grant of executive power in Article II of the Constitution; and (2) a "lack of judicially discoverable and manageable standards for resolving" the question whether particular expenditures should be made. Even assuming *arguendo* that the Constitution gives to the President and his subordinates unreviewable authority to determine whether particular expenditures authorized by Congress should be made at a particular time, it is clear that the instant case presents none of the problems cited by the defendant. Counsel's position on this point must fail simply because he has not correctly characterized the issue before the Court. The Court is not being called on to determine whether the Administrator should *spend* any given amount of money for sewage treatment works. Rather the Court is being asked by plaintiff to require the Administrator to perform what it alleges to be a purely ministerial duty under the Act, that of allotting—and thus making *available for obligation*—the sums authorized to be appropriated in Section 207 of the Act.[9] There is no "textually demonstrable constitutional commitment" of this responsibility to the executive branch, and there is no difficulty in discovering standards for resolving the issue before the Court. Either the Administrator

[9] For this reason the instant case is distinguishable from Housing Authority of San Francisco v. U.S. Department of Housing and Urban Development, 340 F. Supp. 654 (N.D. Cal.1972), cited by the Administrator. In *Housing Authority* the Court found the issue presented to be nonjusticiable because it found in the statute in question a legislative "intention of allowing spending discretion in the executive" and no manageable standards for determining whether the discretion had been abused. 340 F.Supp. at 656.

is required by the Act to allot the full amount of the sums authorized to be appropriated in § 207 or he is not so bound.

The Court is not overstepping its authority in deciding this question, for as our Court of Appeals recently declared: "In our overall pattern of government, the judicial branch has the function of requiring the executive (or administrative) branch to stay within the limits prescribed by the legislative branch." National Automatic Laundry and Cleaning Council v. Schulz, 143 U.S. App. D.C. 274, 280, 443 F.2d 689, 695 (1971). Even more recently, the Eighth Circuit Court of Appeals, citing *inter alia* the opinion in *National Automatic Laundry* determined that a challenge to the legality of a decision by the Secretary of Transportation to defer obligation of funds already apportioned to the State of Missouri under the Federal-Aid Highway Act of 1956, as amended, 23 U.S.C. § 101 et seq (1970), presented a justiciable issue. The question was whether the Secretary had any discretion at all so to act. The State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir., 1973).

It seems clear, then, that for the reasons given and on the basis of the authorities cited, this Court is not barred from reaching the merits of this case either by the doctrine of sovereign immunity or by a lack of a justiciable case or controversy. Hence, it is appropriate now to proceed to the question raised in plaintiff's summary judgment motion, i.e., whether the Administrator had discretion to refuse to allot the sums authorized to be appropriated in § 207 of the Act, or—put the other way around— whether allotment of those sums is a purely ministerial act. The Court may resolve this question on summary judgment because the defendant, in his Statement sub-

mitted pursuant to Local Rule 9(h), has not set forth any specific facts showing that there is a genuine issue for trial. *See* Rule 56(e), F.R.Civ.P.

Resolution of the issue whether the Administrator is required under the Act to make the allotments in question here turns primarily on the meaning of § 205(a) and § 207 of the Act, which read as follows:

"ALLOTMENT

"SEC. 205. (a) Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollution Control Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States. For the fiscal years ending June 30, 1973, and June 30, 1974, such ratio shall be determined on the basis of table III of House Public Works Committee Print No. 92–50. Allotments for fiscal years which begin after the fiscal year ending June 30, 1974, shall be made only in accordance with a revised cost estimate made and submitted to Congress in accordance with section 516(b) of this Act and only after such revised cost estimate shall have been approved by law specifically enacted hereafter.

"AUTHORIZATION

"SEC. 207. There is authorized to be appropriated to carry out this title, other than sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000."

In urging its interpretation of these sections, plaintiff places emphasis on the phrase, "shall be allotted" in § 205(a), contending that the use of "shall" rather than "may" makes plain the mandatory character of this section. The Administrator defends his interpretation (namely, that he has discretion to decide how much to allot) primarily on the grounds that H.R. 11896, the bill from which § 205 and § 207 of the Act are derived, was amended in conference by the insertion of the phrase "not to exceed" before each of the sums specified in § 207 and by the deletion of the word "all" before the phrase "Sums authorized to be appropriated" in § 205(a); both amendments, it is contended, are substantive changes meant to give the Administrator the discretion to withhold allotments as he has done. Given the arguments of the parties, a "plain meaning" analysis is obviously inadequate to the task at hand. Rather, the Court must examine the relevant legislative history to determine whether Congress intended to give the Administrator the kind of discretion he claims to have under the Act. The Wilderness Society v. Morton, 156 U.S. App.D.C. ——, 479 F.2d 842 (1973), at 855.

Of particular importance are the views of sponsors of the legislation in question. See, e.g., First National Bank of Logan, Utah v. Walker Bank and Trust Co., 385 U.S. 252, 261, 87 S. Ct. 492, 17 L.Ed.2d 343 (1966);

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Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394–395, 71 S.Ct. 745, 95 L.Ed. 1035 (1951); Kansas City, Mo. v. Federal Pacific Electric Co., 310 F.2d 271 (8th Cir. 1962), cert. denied, 371 U.S. 912, 83 S.Ct. 256, 9 L.Ed.2d 171, and 373 U.S. 914, 83 S.Ct. 1297, 10 L.Ed.2d 415. Specifically, the Court can properly look to the expressed views of Congressman William Harsha, who is the ranking minority member of the House Committee on Public Works, which reported H.R. 11896, and who was also the bill's floor manager and a member of the conference committee which worked out the final language of the Act, and the views of Senator Edmund Muskie, who is Chairman of the Senate Subcommittee on Air and Water Pollution, which reported the Senate version, S. 2770, and who was floor manager of that bill and a member of the conference committee. It was Congressman Harsha who sponsored the amendments on which the Administrator relies.

An examination of pertinent portions of congressional debates quoted by both plaintiff and defendant reveals that Congressman Harsha intended his amendments not to make any substantive change in the bill but rather to clarify (or "emphasize," to use his own term) the point that the Administrator was to have discretion regarding the *obligation and expenditure* of funds authorized to be appropriated under the Act. Thus, in explaining his amendment, Congressman Harsha said: "I want to point out that the elimination of the word "all" before the words "sums" in section 205(a) and insertion of the phrase "not to exceed" in section 207 was intended by the managers of the bill to emphasize the President's flexibility to control the *rate of spending.*" 118 Cong. Rec. at H9122 (daily ed. October 4, 1972) (emphasis added). Moreover, it is clear from an exchange of remarks by Congressman

Robert Jones of Alabama, Chairman of the conference committee, Congressman Gerald Ford of Michigan, and Congressman Harsha, that this intent was made known to the House, which later voted in favor of the legislation as amended. That exchange is recorded as follows:

> Mr. GERALD R. FORD:
> Mr. Speaker . . . I think it is vitally important that the intent and purpose of section 207 is spelled out in the legislative history here in the discussion on this conference report.
>
> As I understand the comments of the gentleman from Ohio [Harsha], the inclusion of the words in section 207 in three instances of "not to exceed" indicates that is a limitation. More importantly that it is not a mandatory requirement that in 1 year ending June 30, 1973, there would be $5 billion and the next year ending June 30, 1974, $6 billion and a third year ending June 30, 1975, $7 billion *obligation or expenditure?*
>
> Mr. HARSHA. I do not see how reasonable minds could come to any other conclusion than that *the language means we can obligate or expend up to that sum*—any thing up to that sum but not to exceed that amount. * * *
>
> Mr. GERALD R. FORD. Mr. Speaker, I would like to ask the distinguished chairman of the subcommittee and the chairman of the House conferees whether he agrees with the gentleman from Ohio (Mr. Harsha).
>
> Mr. JONES of Alabama.
> . . . My answer is "yes." Not only do I agree with him, but the gentleman from Ohio offered this amendment which we have now under discussion in the committee of conference, so there is no doubt in anybody's mind of the intent of the language. It is reflected in the language just explained by the gentleman from Ohio (Mr. Harsha).

> Mr. GERALD R. FORD. Mr. Speaker, this clarifies and certainly ought to wipe away any doubts anyone has. *The language is not a mandatory requirement for full obligation and expenditure up to the authorization figure in each of the 3 fiscal years.*

Id., at H9123 (emphasis added.)

The Administrator is not supported in his interpretation of the Act's legislative history by citing remarks of Congressman Harsha concerning authority for Executive "impoundment" of funds. During the debates on H.R. 11896, Congressman Harsha took note of recent impoundments by the Executive branch of moneys allocated among the States under the Federal-Aid Highway Act of 1956, and made the following observation:

> [T]he Committee on Public Works is acutely aware that moneys from the highway trust fund have been impounded by the Executive. Expenditures from the highway trust fund are made in accordance with similar contract authority provisions to those in this bill. Obviously *expenditures and appropriations* in the water pollution control bill could also be controlled. However, there is even more flexibility in this water pollution control bill because we have have added "not to exceed" in section 207, as I indicated before.
>
> Surely, if the administration can impound moneys from the highway trust fund which does not have the flexibility of the language of the water pollution control bill, it can just as rightly *control expenditures from the contract authority produced in this legislation by that same means.*

Id., at H9122 (emphasis added).

The impoundments of Federal-Aid Highway Act moneys referred to by Congressman Harsha were of funds already allotted, i. e., the controls were being

exercised at the obligation level rather than at the allotment level.[10] Thus, these comments tend to support the position of the plaintiff rather than that of the defendant in regard to which administrative functions are discretionary and which mandatory under the Act which this Court is called on to construe. It seems obvious from the remarks just quoted that, as Senator Muskie observed:

> Under the amendments proposed by Congressman WILLIAM HARSHA and others, the *authorizations for obligational authority* are "not to exceed" $18 billion over the next 3 years. Also, "all" sums authorized to be obligated need not be committed, though they must be allocated. These two provisions were suggested to give the Administration some flexibility concerning the obligation of construction grant funds.

Id., at S16871 (emphasis added).

The President appears to have concurred in the views of the sponsors concerning § 205 and § 207 of the Act, for in his message explaining his veto of the bill, he stated:

> Certain provisions of . . . [the bill] confer a measure of *spending discretion and flexibility* upon the President, and if forced to administer this legislation I mean to use those provisions to put the brakes on budget-wrecking expenditures as much as possible.
>
> But the law would still exact an unfair and unnecessary price from the public. For I am convinced . . . that the pressure for full fund-

[10] It should be noted that the Court of Appeals for the Eighth Circuit has construed the Federal-Aid Highway Act as requiring obligation of allotted funds, and has thus declared the impoundments referred to by Congressman Harsha to be illegal. State Highway Commission of Missouri v. Volpe, 479 F.2d 1099, (8th Cir., 1973).

> ing under this bill would be so intense that funds approaching the *maximum authorized* amount could ultimately be claimed and paid out, no matter what technical controls the bill appears to grant the Executive. 118 Cong. Rec. at H10266 (daily ed. October 18, 1972) (emphasis added).

In other words, the President believed that the Act required the Administrator to allot the full amount authorized, and he feared that once the Administrator had made the allotments, he might be under great pressure to approve grant applications up to the amount of the allotments. Congress, believing that the needs to which the Act was addressed were sufficiently urgent that expenditure of the full amounts authorized might be necessary,[11] and believing further that the Administrator was given sufficient discretion to avoid any hasty and improvident obligation of funds, passed the bill over the President's veto.

The question whether the entire amount should be *obligated* is, of course, not before this Court. The only question is whether the full allotments must be made, and the answer to that on the basis of the foregoing review of the sponsors' comments seems clear. The language of the pertinent sections of the Act, read in the light of their legislative history, clearly indicates the intent of Congress to require the Administrator to allot, at the appropriate times, the full sums

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[11] The central purpose of the Act as set forth in the first section is to effectuate "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985." § 101 (a)(1). Congressman Harsha recognized that achieving this goal might well require spending the entire $18 billion authorized to be appropriated; and he observed: "To say we can't afford this sum of money is to say we can't afford to support life on earth." 118 Cong.Rec. H10268 (daily ed. October 18, 1972).

authorized to be appropriated by § 207.[12] Hence, this Court has no choice other than to declare that § 205(a) of the Act requires the Administrator to allot among the states $5 billion for fiscal year 1973 and $6 billion for fiscal year 1974.

The only question remaining for decision is whether plaintiff's action may be maintained as a class action on behalf of all similarly situated municipalities within the State of New York. Defendant has opposed maintenance of this suit as a class action solely on the ground that plaintiff does not satisfy subsections (a)(3) and (a)(4) of Rule 23, Fed.R.Civ.P., i.e., it is contended that plaintiff's claim is not typical of those of the proposed class members and that plaintiff cannot adequately represent the class. The Court does not find these points well taken. Differences in amounts which various municipalities might receive from the State allotment have no bearing on the legal issue of whether the allotment as a whole should be increased. Neither can such differences make the City of New York something less than an adequate representative of the class as required by Rule 23(a)(4). Competition for shares of a common fund does not bar a class action on behalf of all competitors when the relief sought would lead to an increase in the total amount of that fund. Berman v. Narragansett Racing

[12] As previous discussion has indicated, pp. 675–676, *supra*, this construction of the Act does not infringe upon any prerogative of the Executive branch. The Court is thus not confronting any delicate constitutional question of the kind which Mr. Justice Brandeis, in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 345–348, 56 S.Ct. 466, 80 L.Ed. 688 (1936), counseled courts to avoid. Hence defendant's reliance on *Ashwander* as authority for the proposition that the Act should be construed so as to enhance his powers at the expense of those of the Congress is not well taken.

Association, 414 F.2d 311, 317 (1st Cir. 1969), cert. denied, 396 U.S. 1037, 90 S.Ct. 682, 24 L. Ed.2d 681 (1970). The Court finds that plaintiff satisfies all the requirements of Rule 23(a) and 23(b)(1)(A), (b)(1)(B), and (b)(2); accordingly, the suit can be maintained on behalf of the proposed class.

APPENDIX F

CAMPAIGN CLEAN WATER, INC.

v.

WILLIAM D. RUCKELSHAUS, ADM. ENVIRONMENTAL PROTECTION AGENCY

Civ. A. No. 18–73–R

United States District Court, E. D. Virginia, Richmond Division, June 5, 1973.

ORDER

MERHIGE, *District Judge:*

In accordance with the memorandum this day filed and deeming it just and proper so to do, it is adjudged and ordered that:

1) Upon the Court's own motion, Robert W. Fri, Acting Administrator of the Environmental Protection Agency, shall be, and is hereby, substituted for William D. Ruckelshaus as the proper party defendant.

2) Campaign Clean Water, Inc., is granted leave to proceed in this action on behalf of its members and those similarly situated in the Commonwealth of Virginia.

3) Defendant's motion to dismiss shall be, and the same is hereby, denied.

4) Plaintiff's motion for summary judgment shall be, and the same is hereby granted.

5) It is declared that the announced policy of the Administrator to refuse to allot $6 billion of the desig-

nated $11 billion under Section 205 of the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. 1251 et seq., for the fiscal years 1973 and 1974 constitutes an abuse of discretion under the authority and powers conferred by the Act. Accordingly, said policy shall be, and the same is hereby, declared null and void.

6) The defendant is directed to report to the Court within ten (10) days of this date those actions taken to conform the administration of the Act to the principles enunciated in the memorandum.

MEMORANDUM

MERHIGE, *District Judge:*

Campaign Clean Water, an environmental group organized to "promote the ecological and environmental advancement of Virginia," seeks in this action to compel the defendant Administrator of the Environmental Protection Agency (E.P.A.) to allot among the states the full sums authorized to be appropriated by Section 207 of the Federal Water Pollution Control Act, as amended by Public Law 92–500 (the "Act") and to estop him from withholding funds so allotted. Jurisdiction is alleged pursuant to 28 U.S.C. §§ 1331 and 1361. The parties are presently before the Court pursuant to plaintiff's motion for summary judgment and defendant's cross-motion to dismiss. Respective counsel have submitted comprehensive memoranda on the issues raised, and it is upon same that this matter is ready for disposition.

The facts are not in dispute. For preliminary purposes they are as follows: On October 4, 1972 the Congress passed a water pollution bill authorizing appropriations in the amount of $11,000,000,000 for waste treatment plant construction grants for fiscal

years 1973 and 1974. The bill was vetoed on October 17, 1972 by the President who stated that he found the measure to be of an "inflationary" nature. The Congress promptly overrode the veto. On November 28, 1972 the Administrator announced that pursuant to the President's direction he was allotting only $5,000,000,000 of the total $11,000,000,000 for treatment plant construction projects for fiscal years 1973 and 1974. It is the Administrator's announced action, which is popularly referred to under the rubric of "impoundment of funds", which is challenged in this suit.

The issues raised are as follows:

1. Whether plaintiff has standing to maintain this action.

2. Whether this action is rendered moot by virtue of City of New York v. Ruckelshaus, 358 F.Supp. 669, CA No. 2466–72 (D.C.1973).

3. Whether the defendant is immune from this suit by virtue of the sovereign immunity doctrine.

4. Whether this matter presents a justiciable controversy.

5. Whether, upon the merits, plaintiff is entitled to the relief sought.

These issues will be considered in seriatim.

I. STANDING

Campaign Clean Water, Inc., as described in the complaint, is a Virginia corporation "organized to promote the ecological and environmental advancement of Virginia. Its officers, directors, and financial contributors include Virginia residents who use the nation's waters for both sport and commercial fishing and for other recreational purposes." The affidavit of the organization's president, Newton H. Ancarrow,

indicates that it was created through the efforts of various groups. Included among the founders is the Chesapeake Bay and its Tributaries Watermen's Union, whose members derive their income from shellfishing, and among its contributors are the Virginia Beach Innkeepers Association and other individuals who engage in boating and swimming on Virginia's waters and who own waterfront property. They allege that their interests are impaired by the discharge of untreated or inadequately treated sewage from overly burdened waste treatment plants into the waters of Virginia.

In particular, it is alleged that individual members of the groups who have formed and contributed to Campaign Clean Water, Inc., have suffered economic injury from contaminated waters caused by sewage discharge from several plants operated by the Hampton Roads Sanitation District. Members of the Chesapeake Bay and its Tributaries Watermens Union, for example, allege that shellfish beds in the area have been rendered unusable by such contamination. The injuries of the various members of Campaign Clean Water, Inc., are tied to the acts of the defendant by the allegation, supported by a letter from the General Manager of the Hampton Roads Sanitation District, that the withholding of funds will have a disastrous effect on future plans for water treatment plants on Virginia's waters and will thus allow the injury to the plaintiff's interests to continue.

The doctrine of standing, emanating from the case or controversy requirement of Article III of the Constitution and from general principles of judicial administration, seeks to ensure that the plaintiff to an action has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues

upon which the Court so largely depends . . ." Baker v. Carr, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962). Problems of standing in actions against public officials may arise in either of two contexts, depending upon whether the plaintiff relies in his action upon a statute authorizing the invocation of the judicial process.

The majority of cases in which the plaintiff relies upon such a statute involves the Administrative Procedure Act (APA) and its language granting the right of review to any party "suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. Standing in such cases is available only where the plaintiff has alleged active injury in fact at the hands of the defendant and where the alleged injury was to an interest "arguably within the zone of interests to be protected or regulated" by the statutory requirements to which the plaintiff seeks to compel adherence. Association of Data Processing Service Organizations, Inc. v. Camp, 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970). Where the plaintiff does not rely upon a specific statute such as the APA, he still must meet standing requirements which are virtually identical to those imposed by the APA. Specifically, he must allege an actual injury to himself and in addition show that such injury is to an interest that is protected by the legal right which he asserts is violated by the defendants' act. Linda R. S. v. Richard D., 410 U.S. 614, 93 S.Ct. 1146, 35 L.Ed.2d 536 (1973). As the Supreme Court has framed the second aspect, there must be a "logical nexus between the status [of the plantiff] asserted and the claim sought to be adjudicated." Flast v. Cohen, 392 U.S. 83, 102, 88 S.Ct. 1942, 1953, 20 L.Ed.2d 947 (1968).

Although the plaintiff does not invoke the APA in pursuing this claim, the Court is satisfied that the action is one which could have been brought pursuant to that act. See City of New York v. Ruckelshaus, 358 F.Supp. 669, CANo. 2466–72 (D.D.C.1973). Even if it could not, however, the Court's foregoing discussion leads it to conclude that generally the same standards apply as would apply in an APA case. In either case, Campaign Clean Water clearly has standing in this action.

The allegations of the complaint and affidavit indicate that individual members of groups belonging to and contributing to the plaintiff suffer direct, pecuniary injury as a result of waste contamination in Virginia's waters. Such injury is particularized and sets these members apart from the public, in general. Since an organization whose members are injured may represent those members in judicial proceedings, Sierra Club v. Morton, 405 U.S. 727, 739, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972); James River and Kanawha Canal Parks, Inc., v. Richmond Metropolitan Authority, 359 F.Supp. 611 (E.D.Va.1973), Campaign Clean Water, Inc., may assert these claims. The fact that the groups representing the individuals injured rather than the individuals themselves are the actual members of Campaign Clean Water is unimportant, since it is the interests of the individual persons that the plaintiff ultimately represents.

The Court further finds that the requisite nexus between the injury and the right asserted exists in this case. The plaintiff by its allegations directly attributes the injury incurred to the inadequacy of waste treatment plants, particularly in the Hampton Roads area. With federal money, new treatment plants will be built and old ones improved, all of which will lessen the existing damage suffered by the plaintiff. Since

the plaintiff's assertion is that the defendant is under a duty to release federal funds for waste treatment plants, it is clear that the injury incurred falls within the scope of interests benefitted by that duty. Accordingly, Campaign Clean Water, Inc., has standing to pursue this action.

II. MOOTNESS

The Court *sua sponte* raises the issue of mootness in view of the recent District Court decision of Judge Oliver Gasch in City of New York v. Ruckelshaus, 358 F.Supp. 669, CANo. 246–72 (D.D.C. 1973). In that action, the plaintiffs, the Cities of New York and Detroit, challenged the refusal of the present defendant to allot the funds appropriated under the Act which are the subject of this action. Judgment was entered for plaintiffs. Whether or not the Administrator will appeal that decision is unknown at this time.

The Court has examined Judge Gasch's opinion and concludes that, in light of the relief sought and order entered in that matter, the present action is not moot.

The City of New York sued on behalf of itself and all similarly situated municipalities in the State of New York. The City of Detroit, additionally, was granted leave to intervene as plaintiff. While the relief granted included *inter alia* declaratory and injunctive relief which applies to the whole fund, the Court has some doubts that the present plaintiffs could, in view of the class definition in *City of New York*, properly enforce that judgment as it applies to them.

There is, however, a more compelling reason militating against mootness which, in part, derives from the peculiar nature of the administrative procedures

under the Act. While these procedures will be reviewed at length *infra*, for these purposes a brief summary will suffice.

The procedure is as follows:

Section 207 authorizes specific sums of money to be appropriated. The administrator is required by § 205 to allot the sums in accordance with a formula set forth in § 205(a). Once allotted to the states or municipalities' contract authority exists up to these amounts. In a second stage, the Administrator reviews grant applications from the states and municipalities to determine whether they satisfy the criteria of § 204 of the Act. Once these plans are approved, a contractual obligation on the part of the United States arises to pay the federal share allocable to the project. In sum, there is a two step process of 1) allotment and 2) expenditure.

The *City of New York* suit challenged only alleged abuses of discretion by the defendant with respect to allotment. Relief with respect to the expenditure stage was neither sought nor granted. This action seeks relief with respect to alleged abuses of discretion or possible abuses of discretion at both stages of the program. For this reason as well, this action is not moot.

III. SOVEREIGN IMMUNITY

The defendant grounds his motion to dismiss in part upon an asserted application of the "sovereign immunity" doctrine. The gravamen of that doctrine has been stated in Land v. Dollar, 330 U.S. 731, 67 S.Ct. 1009, 91 L.Ed. 1209 (1947): a suit is one against the sovereign, and therefore barred, if "[t]he 'essential nature and affect of the proceeding' may be such as to make plain that the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration." While the

instant matter squarely falls within this definition, it also falls within a well-settled exception to the sovereign immunity doctrine.

Said exception is expressed in Dugan v. Rank, 372 U.S. 609, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963), which holds that a suit may be brought against an officer of the United States to challenge an action which allegedly exceeds statutory authority or, if within the scope of authority, is premised upon a power which is unconstitutional. See also Malone v. Bowdoin, 369 U.S. 643, 647, 82 S.Ct. 980, 8 L.Ed.2d 168 (1962). One common vehicle for challenging an official's action upon this theory is mandamus jurisdiction, 28 U.S.C. § 1361, which is relied upon here by plaintiff.

The complaint alleges that the defendant has exceeded his statutory authority in impounding funds. If sustained on the merits, plaintiff will come within the above recited exception to the doctrine. Accordingly, at this stage, the Court is satisfied that Campaign Clean Water has carried its burden in overcoming the bar of sovereign immunity.

IV. JUSTICIABLE CASE OR CONTROVERSY

The defendant urges that this action does not present a justiciable case or controversy. A two-pronged argument is presented, and the two issues raised thereby will be considered in turn.

A. Ripeness

Defendant contends that this action is premature. The gravamen of that argument is that plaintiff (or those interests it represents) is without a claim absent specific denial of funds to proposed projects. Because no proposals have been submitted and rejected, it is argued that the present claim is hypothetical.

Defendant's argument is without merit. Legislative history is probative of the fact that the scheme of allotment followed by obligation was adopted in the Act to facilitate long range planning, a necessary element in the development of water treatment plants. 118 Cong. Rec. H. 2727 (3/29/72); *City of New York supra.* Because funds are allotted on a yearly basis (Section 207), it appears that those funds not allotted in the appropriate year are forever lost.[1] The failure to allot, therefore, may have a decisive and detrimental impact upon treatment plant development planning. Said impact gives rise in part to the injuries alleged here and satisfies the Court that this action is not premature.

B. Political question

The defendant urges that plaintiff has called upon the Court to decide a "political question," which it is asserted is beyond the proper exercise of federal court jurisdiction. Colegrove v. Green, 328 U.S. 549, 66 S.Ct. 1198, 90 L.Ed. 1432 (1946). Baker v. Carr, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962). While the Court is cognizant that the issue raised here has contemporary political overtones, it is satisfied, for reasons that follow, that this matter does not present a political question in the legal sense. The Supreme Court in Baker v. Carr, 369 U.S. at 217, 82 S.Ct. at 710 clarified this distinction and enunciated as well the standard by which political questions may be identified:

> It is apparent that several formulations which vary slightly according to the settings in which the questions arise may describe a political question, although each has one or more

[1] However, funds allotted for a given year but not obligated may be reallotted the following fiscal year § 205(b)(1).

> elements which identify it as essentially a function of the separation of powers. Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it: or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made, or the potentiality of embarassment from multifarious pronouncements by various departments on one question.
>
> Unless one of these formulations is inextricable from the case at bar, there should be no dismissal for nonjusticiability on the ground of a political question's presence. The doctrine of which we treat is one of "political questions," not one of "political cases." The courts cannot reject as "no law suit" a bona fide controversy as to whether some action denominated "political" exceeds constitutional authority.

In determining whether this action, by reason of the above recited standards, presents a political question, the Court has considered defendant's assertion that "[w]hile spending controls are not 'textually committed' by the Constitution to any of the three departments, it is clearly not a matter for the judiciary. Moreover, the grant of 'executive power' in Article II comes very close to a 'textually demonstrable' commitment of this responsibility to the President." Defendant's brief at 11. Defendant overstates the issue here present: *contra* to defendant's broad assertions, the Court is required to determine whether the specific

Act in question mandates spending policies in contravention to those announced by the Administrator. This is a narrow issue and a matter of statutory interpretation. The Court recognizes that this conclusion impliedly makes short shrift of defendant's underlying contention that spending of funds legislatively appropriated is solely within the province of executive discretion. Nevertheless, to support defendant's contention would require the Court to postulate a broad reading of executive power which includes the proposition that the Congress may make funds available for spending or mandate the manner in which they are spent, but may not mandate that they, in fact, be spent. That contention has in essence been firmly rejected in a well-reasoned opinion by Judge Jones in Local 2677 v. Phillips, 358 F.Supp. 60 (D.D.C.1973). As Judge Jones noted in language appropriate here, "[t]he defendant really argues that the Constitution confers the discretionary power upon the President to refuse to execute laws passed by Congress with which he disagrees."

More than a century ago the United States Supreme Court laid to rest any contention that the President has the power suggested. See Kendall v. United States, 12 Pet. 524, 37 U.S. 524, 9 L.Ed. 1181 (1838), where the Court stated:

> To contend, that the obligation imposed on the president to see the laws faithfully executed, implies a power to forbid their execution, is a novel construction of the constitution, and entirely inadmissible. 37 U.S. at 611.

See also National Automatic laundry v. Shultz, 143 U.S.App.D.C. 274, 443 F. 2d 689, 695 (1971), holding that "the judicial branch has the function of requiring the executive (or administrative) branch to stay within the limits prescribed by the legislative branch."

Accordingly, the issue before the Court calls for an interpretation of the Act. There is no issue here vis-a-vis "executive power" and in that respect this case does not present a political question. Defendant also urges that there is a "lack of judicially discoverable and manageable standards for resolving" the questions posed here. The Court disagrees. The Court is not being asked to supervise the operations of the EPA. Solely sought here is declaratory and injunctive relief with respect to the announced policy of impoundment. The standards for fashioning that relief, if appropriate, will be discussed in conjunction with the merits. At this stage, however, the Court fails to discern a political question lurking in the record before it.

V. THE MERITS

Plaintiff essentially challenges the defendant's announced policy with respect to impoundment of allotments and prays as well that the Court retain jurisdiction so as to grant appropriate relief to prevent abuse of discretion with respect to appropriations. The allotment question will be considered first.

A. Allotment

The relevant portions of the Act read *inter alia* as follows:

ALLOTMENT

> Sec. 205. (a) Sums authorized to be appropriated pursuant to section 207 for each fiscal year beginning after June 30, 1972, shall be allotted by the Administrator not later than the January 1st immediately preceding the beginning of the fiscal year for which authorized, except that the allotment for fiscal year 1973 shall be made not later than 30 days after the date of enactment of the Federal Water Pollu-

tion Control Act Amendments of 1972. Such sums shall be allotted among the States by the Administrator in accordance with regulations promulgated by him, in the ratio that the estimated cost of constructing all needed publicly owned treatment works in each State bears to the estimated cost of construction of all needed publicly owned treatment works in all of the States. For the fiscal years ending June 30, 1973, and June 30, 1974, such ratio shall be determined on the basis of table III of House Public Works Committee Print No. 92–50. Allotments for fiscal years which begin after the fiscal year ending June 30, 1974, shall be made only in accordance with a revised cost estimate made and submitted to Congress in accordance with section 516(b) of this Act and only after such revised cost estimate shall have been approved by law specifically enacted hereafter.

AUTHORIZATION

Sec. 207. There is authorized to be appropriated to carry out this title, other than sections 208 and 209, for the fiscal year ending June 30, 1973, not to exceed $5,000,000,000, for the fiscal year ending June 30, 1974, not to exceed $6,000,000,000, and for the fiscal year ending June 30, 1975, not to exceed $7,000,000,000.

The specific issue is whether the langauge of § 205, "Sums authorized to be appropriated . . . shall be allotted . . ." allows the discretionary impoundment policy announced by the Administrator. The parties have taken preliminary positions upon the face of the statute. Plaintiff urges that the phrase "*shall* be allotted" proscribes the exercise of discretion announced by the defendant; the Administrator, on the other hand, urges that the language "not to exceed" in section 207 is expressive of the range of discretion built into the Act. See Housing Authority of San

Francisco v. United States Department of Housing and Urban Development, 340 F.Supp. 654 (N.D.Cal. 1972). Because the statute itself gives rise to conflicting interpretations, inquiry directed beyond the precise language is called for.

Defendant urges that legislative history is supportive of his position. Specifically he cites amendment of the language in question by a House-Senate conference committee which deleted the word "all" before the phrase "sums authorized to be appropriated" in § 205 and the addition of the aforementioned phrase "not to exceed" in § 207. With specific reference to § 205 the Court finds the amendment highly significant. Thus, the House bill originally considered read:

> "*All* sums authorized to be appropriated . . . shall be allotted by the Administrator . . ." (emphasis supplied).

The amended section reads as amended:

> "Sums authorized to be appropriated . . . shall be allotted by the Administrator . . ."

Defendant urges that the only logical interpretation of this amendment is that the Congress did not intend that "all" sums authorized be appropriated, or conversely, that the Administrator was given authority to exercise his discretion in that regard. The views of Congressman Harsha, the House sponsor, are supportive of this view:

> Furthermore, Mr. Speaker, we have emphasized over and over again that if Federal spending must be curtailed, and if such spending cuts must affect water pollution control authorizations, the administration can impound the money.
>
> I want to point out that the elimination of the word "all" before the word "sums" in section 205(a) and insertion of the phrase "not to exceed" in section 207 was intended to em-

> phasize the President's flexibility to control the rate of spending. 118 Cong.Rec. H. 10268.

Yet the Senate sponsor, Senator Muskie, was of the opinion that this "flexibility to control the rate of spending" occurred at the obligation rather than allotment stage:

> Under the amendments proposed by Congressman WILLIAM HARSHA and others, the *authorizations for obligational authority* are "not to exceed" $18 billion over the next 3 years. Also, "all" sums authorized to be obligated need not be committed, though they must be allocated. These two provisions were suggested to give the Administration some flexibility concerning the obligation of construction grant funds.

Id., at S 16871 (emphasis added).

This view is itself not inconsistent with other remarks by Congressman Harsha which followed his above recited statement:

> I might add, while this legislation does provide for contract authority, the present administration recommended contract authority in H.R. 18779, the bill I introduced in behalf of the administration some time ago. Furthermore, let me point out, the Committee on Public Works is acutely aware that moneys from the highway trust fund have been impounded by the Executive. Expenditures from the highway trust fund are made in accordance with similar contract authority provisions to those in this bill. Obviously expenditures and appropriations in the water pollution control bill could also be controlled. However, there is even more flexibility in this water pollution control bill because we have added "not to exceed" in section 207, as I indicated before.
>
> Surely, if the administration can impound moneys from the highway trust fund which

> does not have the flexibility of the language of the water pollution control bill, it can just as rightly control expenditures from the contract authority produced in this legislation by that same means.[2]
>
> Second, I would like to point out that the Administrator of the Environmental Protection Agency must approve plans, specifications, and estimates. This is the pacing item in the expenditures of funds. It is clearly the understanding of the managers that under these circumstances the Executive can control the rate of expenditures.

Id. at H 10268.

Judge Gasch in *City of New York* concluded from this language and other by-play that, in accordance with Senator Muskie's views, the discretionary elements incorporated into the Act and referred to by the various legislators were meant to apply to executive control over the "rate of spending," but that the rate of spending was to be monitored only at the obligation stage and not by the withholding of allotments.

This Court respectfully declines to adopt this interpretation, primarily because it appears to de-emphasize the syntactical history of Section 205 which shows the purposeful removal of the word "all" from § 205. While the legislative debates lend strength to Judge Gasch's conclusion, the Court, the plaintiff,

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[2] As Judge Gasch observed in *City of New York*, Cong. Harsha's position has itself been rendered suspect by a subsequent Court decision:

> It should be noted that the Court of Appeals for the Eighth Circuit has construed the Federal-Aid Highway Act as requiring obligation of allotted funds, and has thus declared the impoundments referred to by Congressman Harsha to be illegal. State Highway Commission of Missouri v. Volpe, 479 F.2d 1099 (8th Cir., 1973).

and, to a limited extent, the defendant, are in agreement that legislative history is in the main unclear, politically charged, and in the Court's view, to some degree based upon suspect constitutional interpretation of the powers of the President.[3] In this context the syntactical history must be given great weight. See generally Gilbert v. General Electric, 347 F.Supp. 1058 (E.D.Va. 1972). The Court accordingly concludes that the Congress did intend for the executive branch to exercise some discretion with respect to allotments. Plaintiff, in fact, does not seriously dispute this conclusion, but contends that "the Congress could not have intended to give the Administrator the discretion to gut the Act." This latter contention merits close scrutiny.

Legislative history from the time of the veto is especially helpful because the executive's position with regard to bill passed was framed in the context of its alleged inflationary impact. Accordingly, the issue of just how much was required to be spent under the terms of this legislation was central to the discussion that followed.

The President's veto message with regard to the Act is made perfectly clear in the following language from his veto message:

> Certain provisions of . . . [the bill] confer a measure of spending discretion and flexibility upon the President, and *if forced to administer this legislation I mean to use those provisions to put the brakes on budget-wrecking expenditures as much as possible.*

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[3] See note 2, *supra* (re: highway fund impoundments) and discussion at page 695, *ante* (re: general power of the executive to withhold funds absent congressional authorization.)

> But the law would still exact an unfair and unnecessary price from the public. For I am convinced . . . that the pressure for full funding under this bill would be so intense that funds approaching the maximum authorized amount could ultimately be claimed and paid out, no matter what technical controls the bill appears to grant the Executive. 118 Cong.Rec. at H 10266 (daily ed. October 18, 1972) (emphasis added).

Both houses of Congress promptly overrode the veto. Prior to the respective votes, Senator Muskie reiterated the national commitment to clean water,[4] and cognizant of the spending discretion vested by the Act in the President, urged that the large scale policy adopted be reaffirmed by overriding the veto. 188 Cong.Rec. S 18546 et seq. Eighty-one percent of the Senators present voted to override.

Representative Harsha, upon resubmission, expressly addressed the alleged inflationary nature of the bill, stating that a large scale water improvement effort was worth the price that might be caused:

> I don't think there is one Member of this body who has not asked his constituents whether or not they were willing to pay the high price to achieve our national environmental goals. I don't think that there is one Member of this body who could report that after such polling, his constituents objected * * *
> * * * [T]he President maintained that a vote to override the veto of the Water Pollution Act Amendments of 1972 was a vote to increase

[4] Interestingly, the Senate had originally chosen not to pass an administration bill (S. 1013) which would have authorized sums close to those slated for spending under the challenged impoundment policy.

> the likelihood of higher taxes. So be it, the public is prepared to pay for it. To say we can't afford this sum of money is to say we can't afford to support life on earth. Id. at H 10268.[5]

The House voted by a margin of 91% of those present to override.

From the above recited history, the Court draws several conclusions:

1) The Congress passed a large scale clean water bill committing the nation to an extensive program to fight pollution. In so doing, the Senate rejected a smaller scale commitment proposed by the administration.

2) The Congress purposefully incorporated provisions in the Act which would allow some degree of spending discretion by the executive. These provisions were motivated in part by a desire to avoid a veto, see 118 Cong.Rec. at S. 16871, and in part by the assumption of some legislators (notably Rep. Harsha),

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[5] The tenor of these remarks is akin to the remark of Senator Muskie prior to passage of the bill:

"* * * [T]hose who say that raising the amounts of money called for in this legislation may require higher taxes, or that spending this much money may contribute to inflation simply do not understand the language of this [water pollution] crisis.

"The conferees spent hours and days studying the problem of financing the cleanup effort required by this new legislation. The members agreed in the end that a total of $18 billion had to be committed by the Federal Government in 75-percent grants to municipalities during fiscal years 1973–75. That is a great deal of money; but that is how much it will cost to begin to achieve the requirements set forth in the legislation. * * *

"* * * [T]he conferees are convinced that the level of investment that is authorized is the minimum dose of medicine that will solve the problems we face. 118 Cong. Rec. S 16870 et seq."

but not all (notably Senator Muskie), that some funds may be impounded.

3) The President vetoed the bill because of its alleged inflationary impact, notwithstanding his recognition of the discretionary provisions of the bill.

4) The Congress overrode the veto by large margins, reaffirming the massive national commitment to environmental protection and the willingness to incur vast expenses in achieving that commitment.

Upon the foregoing, the Court is well-satisfied that the challenged impoundment policy, by which 55% of the allocated funds will be withheld, is a violation of the spirit, intent and letter of the Act and a flagrant abuse of executive discretion. Accordingly, the Court will enter a declaratory judgment holding that that policy is null and void.

Further relief, however, is not now required. The Court will not and cannot supervise the Administrator in the administration of the Act. Issuance of an injunction would accordingly be inappropriate. While the Court has no reason to conclude that the defendant will not make a good faith effort to proceed in the allotment of funds in accordance with the letter and spirit of this memorandum, it does note that the plaintiff may at any time move to reopen this matter so as to contest such future actions or lack of actions on the part of the Administrator as they may contend are arbitrary, capricious or violative of the Act as herein enunciated. At this stage, the Court will only require that the defendant report to the Court within ten (10) days of this date such actions as have been taken to conform the administration of the program to the principles enunciated in this memorandum.

B. Appropriations

For the reasons heretofore stated, the Court is satisfied that the defendant may not with propriety adopt policies which contravene the letter and spirit of the Act. However, specific relief with respect to future appropriations at this stage would be premature, especially in view of the expert discretion designed for the appropriations stage. See *City of New York, supra.* For these purposes, the Court concludes that the declaratory relief issued with respect to the allotment stage will place the defendant on notice that a similarly designed and motivated impoundment policy with respect to appropriations would contravene the letter and spirit of the Act.

VI. SCOPE OF RELIEF

In view of the nature of the relief granted, the Court declines to issue same with respect to those interests not represented directly by plaintiffs. To do otherwise would potentially burden the Court and prospective parties with reviewing individual actions of the Administrator which may apply to locations in more appropriate forums. Accordingly, declaratory judgment will be issued only with respect to those interests in Virginia represented by the plaintiff organization. This determination as well precludes further difficulties of class determination and notice not warranted by the nature of the relief given.

An order consistent with this memorandum shall issue.

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